TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 500

GUY S. MARTIN, PETITIONER,

vs.

NATIONAL SURETY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 30, 1936.

CERTIORARI GRANTED DECEMBER 7, 1936.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 10,536

IN EQUITY.

GUY S. MARTIN, APPELLANT,

vs.

NATIONAL SURETY COMPANY, A CORPORATION, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED DECEMBER 13, 1935.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1936, of said Court, before the Honorable Archibald K. Gardner and the Honorable John B. Sanborn, Circuit Judges, and the Honorable Gunnar H. Nordbye, District Judge.

Attest:

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the thirteenth day of December, A. D. 1935, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Guy S. Martin was Appellant and the National Surety Company, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Citation and Acknowledgment of Service.)

The United States of America

To: National Surety Company, a corporation, James Beveridge, C. H. Roth, Homer C. Burke, Trustee in Bankruptcy of Gandy and Earp, H. H. Sandman, Emil Jubelt and W. R. Jubelt, A. H. Ladd, Mississippi Lime and Material Co., Alton Brick Company, Axtell Kramer, Bi-Wax Corporation, A. T. Modglin, Burt Mfg. Co., Philip Carey Company, Egyptian Supply Company, Ludowici-Celadon Co., Brass & Copper Sales Co., U. S. Gypsum Company, Carlinville Tile Co., Chamberlin Metal Weatherstrip Co., Crane Company, Columbia Quarry Company, H. D. Condie, Receiver of Condie Bray Glass Co., Edward Endiger Co., H. A. Framberg, Hunkins-Willis Lime and Cement Co., Illinois Steel Bridge Co., H. E. Kennedy, Carl A. Koerner, doing business as Koerner Engineering Co., Master Builders Co., The McClelland Co., McGrath Sand & Gravel Co., Mesker Bros. Iron Co., Fred S. Morse, St. Louis Asphalt Co., Schwab Safe Co., Walter C. Schwartz, Max Sher, F. M. Tilley, Wiles Chipman Lumber Co., Winkle Terra Cotta Co., U. S. Gypsum Co., Usona Mfg. Co., Peter Vredenburgh Lumber Co., Illinois Power and Light Co., Geo. Edw. Day Sons Co. Inc., Otto G. Braun, Straub Bros., Walter G. Malham, Larry Schaff, Galloway-Von Gruenigen Co., Wenzil Andris, Jack Hyde, Robert E. Lancaster, Assignee of Lancaster and Howard, H. A. Kribs, Inc., Schwartz Material Co., Martin Welte, Walter M. Winslow, George Edward Day Sons Co., Pittsburgh Plate Glass Company, Tamms Silica Company, Cope & Fisher, Assignee of Gandy and Earp, Central Architectural Iron Works, Metzler Bros. Auto Repair Company, C. F. Rabeitt Inc., Shapleigh Hardware Company, Ibbetson & Murphy Lumber Company, and Italian Marble Company—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, forty days from and after the day this Citation bears date, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Guy S. Martin is Appellant, and you are Appellees, to show cause, if any there be, why the judgment rendered against the said Appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Charles B. Davis, Judge of the District Courts of the United States for the Eastern District of Missouri, this 23rd day of February, in the year of Our Lord One Thousand Nine Hundred and Thirty-five.

CHARLES B. DAVIS,
United States District Judge for the Eastern District of Missouri.

Service hereof acknowledged this 7th day of March, 1935.

J. H. CUNNINGHAM, JR.,
Atty. for Galloway-Von Gruenigen Co.

OTTO O. FICKEISSEN,
Atty. for James Beveridge, Mississippi Lime & Mat. Co., Alton Brick Co., Carl A. Koerner, Usona Mfg. Co., Wenzil Andris, Schwartz Material Co.

2

ARTHUR E. KAMMERER and
LEO RASSIEUR, JR.,
Co-partners doing business as Rassieur, Kammerer & Rassieur, Attorneys for the McCelland Co., H. E. Kennedy, Robt. E. Lancaster, Vredenburgh Lbr. Co. and H. H. Sandman.

NATIONAL SURETY CO.,
By Fordyce, White, Mayne & Williams, Its Attys.

IGOE, CARROLL, HIGGS & KEEFE,
Attorneys for Illinois Steel Bridge Co.

GREENSFELDER & GRAND,
Attys. for Hunkins-Willis Lime & Cement Co.

DAVID K. BREED,
Atty. for Central Architectural Iron Works.

DEGEN & KRAMER,
Attys. for Mesker Bros. Iron Co. and H. A. Framberg.

FRANK A. ZEIS,
Atty. for Otto G. Braun, Walter G. Malham, Larry Schaf and Straub Bros.

KENNETH TEASDALE,
Atty. for St. Louis Asphalt Co.

FELIX CORNITIUS,
Atty. for Shapleigh Hdw. Co.

WILES-CHIPMAN LUMBER COMPANY,
By R. C. Crosby, Its Secretary.

Served on John B. Edwards, Attorney for

ITALIAN MARBLE COMPANY and
U. S. GYPSUM CO.,

on March 12, 1935.

RICHARD S. BULL.

Subscribed and sworn to before me this 6th day of June, 1935.

(Notarial Seal) ETHEL A. GIBLIN,
Notary Public.

My Commission expires 7-30-35.

3 Service of attached citation acknowledged this ..... day of March, 1935.

ALVIN G. WHITEHOUSE,
Gillespie, Ill., Attorney for Emil Jubelt and W. R. Jubelt and A. H. Ladd.

MONROE & ALLEN,
Decatur, Ill., Attorneys for Cope & Fisher, Assignee of Gandy & Earp.

W. S. BODMAN,
Decatur, Ill., Attorney for Homer C. Burke, Trustee in Bankruptcy of Gandy & Earp.

BANISTER, LEONARD SIBLEY & McROBERTS, EARL SUSMAN,
Attorneys for Edward Endiger Co.

WINKLE TERRA COTTA CO.,
By Vincent D. Gallo,

JAMES E. KING,
Attorney for C. F. Rabbeitt & Co.

HERBERT F. HAHN,
Attorney for Philip Carey Co.

M. P. PHILLIPS,
705 Olive St., St. Louis, Mo.,
Attorney for Fred S. Morse.

BLACKINTON, REID & HARRIS,
Attorneys for Brass & Copper Sales Co.

THE BURT MANUFACTURING COMPANY,
By C. A. Palmer, Prest.

WILLIAM T. KEIL,
Attorney for Jack Hyde.

Service hereof acknowledged this 8th day of May, 1935.

OTTO O. FICKEISSEN,
Attorney for Tamms Silica Co.; Walter C. Schwartz; Chamberlin Metal Weatherstrip Co.; Master Builders Co.; Pittsburgh Plate Glass Co.; Axtell Kramer; A. T. Modglin; McGrath Sand & Gravel Co.; Ludowici Celadon Co.; H. A. Kribs, Inc.; C. H. Roth; Egyptian Supply Co.; Crane Company; Condie-Bray Glass & Paint Co.; Bi-Wax Corp.; Martin Welte.

E. H. SCHWARZENBACH,
Attorney for George Edward Day Sons, Inc.

Service hereof acknowledged this 5th day of June, 1935.

COLUMBIA QUARRY CO.,
By H. F. Schmitt, Secy.-Treas.

Service hereof acknowledged this 15th day of June, 1935.

OTTO O. FICKEISSEN,
Trustee, pursuant to order of Court entered June 11, 1935, for: Carlinville Tile Co., Max Sher, F. M. Tilley, Walter M. Winslow, Metzler Bros. Auto Repair Co., Ibbetson & Murphy Lumber Co., Illinois Power & Light Co.

HOMER C. BURKE,
Trustee in Bankruptcy of Gandy & Earp, Emil Jubelt and W. R. Jubelt, A. H. Ladd, Burt Mfg. Co., Cope & Fisher, Assignee of Gandy & Earp, Schwab Safe Co.

This acknowledgment of service is made solely for the purpose of complying with the order of court and is made without prejudice to the rights of any parties represented by me to make any and all objections deemed necessary to the allowance of appeal and sufficiency thereof.

OTTO O. FICKEISSEN.

Endorsed: Filed in U. S. District Court on June 15, 1935.

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6 Record Entry of Filing of Bill of Complaint.

(February 9th, 1933.)

National Surety Company, a corporation, Plaintiff,
10270. vs.
Albert Clement Tobin, an individual trading as A. Clement Tobin & Company, Walter F. Brown, Postmaster General of the United States, Ogden L. Mills, Secretary of the Treasury of the United States, Walter O. Wood, Treasurer of the United States, and Guy S. Martin, Defendants.

Now comes plaintiff and files herein its bill of complaint, together with photostatic copies of certain documents thereto attached; whereupon a subpoena in equity is issued for service on defendants, Albert Clement Tobin and Guy S. Martin, returnable March 1, 1933.

---

7 Order to Show Cause.

(Filed and Entered Feb. 9, 1933.)

Now this day comes plaintiff, by its attorneys, and presents to the Court verified petition heretofore filed, praying, among other things, for an injunction and restraining order

against said defendants, Albert Clement Tobin and Guy S. Martin, from receiving any funds representing the balance due under a certain contract for the construction of the Post Office Building at Carlinville, Illinois, on behalf of the United States Government, and also for the appointment of a receiver; and the Court having seen and examined said petition and being sufficiently advised, doth order that the defendants, Albert Clement Tobin and Guy S. Martin, and each of them, be and appear in this Court, in Division No. 2, on February 15, 1933, at 10:00 A. M., then and there to show cause, if any they have, why a restraining order and injunction shall not issue and why a receiver should not be appointed, as in said petition prayed.

Dated at St. Louis, Missouri, 2-9-1933.

CHARLES B. DAVIS,
District Judge.

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8 Record Entry of Filing of Amended Bill of Complaint.

(February 18, 1933.)

Now comes plaintiff and by leave of Court files herein its amended bill of complaint.

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9 Amended Bill of Complaint.

(Filed February 18, 1933.)

Comes now the plaintiff and for cause of action against the defendant, states:

1. That the plaintiff is a corporation organized under the laws of the State of New York, and licensed to do business in the State of Missouri, and elsewhere as a surety company, having a branch office for the transaction of business in the City of St. Louis, State of Missouri, and by reason thereof brings this suit in its own right.

2. That the defendant, Albert Clement Tobin, an individual doing business as A. Clement Tobin & Company, is a citizen of the City of St. Louis, State of Missouri; that the defendant, Walter F. Brown, is a citizen of the United States, at present residing in the District of Columbia, and is sued in his official capacity as Postmaster General of the United States; that the defendant, Ogden L. Mills, is a citi-

10 zen of the United States at present residing in the District of Columbia, and is sued in his official capacity as Secretary of the Treasury of the United

States; that the defendant, Walter O. Wood, is a citizen of the United States, at present residing in the District of Columbia, and is sued in his official capacity as Treasurer of the United States; that the defendant, Guy S. Martin is a resident of the City of St. Louis, Missouri.

3. That on or about the 12th day of February 1932, Albert Clement Tobin, in writing, contracted with the United States of America, by and through the proper officers of the Post Office Department, to furnish all the labor and materials and perform all work required for the construction, including approaches, of the Post Office at Carlinville, Illinois, and hereinafter referred to as the Carlinville Post Office building, the consideration for said contract being Forty-nine Thousand and Five Hundred Dollars ($49,500.00), to be paid, unless otherwise provided in specifications, by partial payments as the work progressed at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer, provided, however, that in making such partial payments there shall be retained ten per cent of the estimated amount until final completion and acceptance of the work covered by the contract, all as provided in the said contract, a photostatic copy thereof, marked Exhibit "A", being hereto attached and made a part hereof.

4. That pursuant to the statutes of the United States, theretofore made and provided, the said Albert Clement Tobin was required, as a condition precedent to the awarding of said contract, to furnish bond to the United States in the penal sum of Twenty-five Thousand Dollars ($25,-
11 000.00) conditioned that he would well and truly perform and fulfill the undertaking, covenants and conditions of the said contract, and, further, that he would promptly make payments to all persons supplying labor and material in the prosecution of the work provided for in the said contract.

5. That on or about the 19th day of February, 1932, Albert Clement Tobin, defendant herein, as an inducement and consideration for the execution of the bond required in connection with said contract, made written application to plaintiff herein requesting it to execute said bond. In said application it is stated, among other things, that said applicant agreed to indemnify plaintiff from and against any and all liability, loss, costs, damages, attorneys' fees, and expenses of whatever kind and nature which the plaintiff might sustain or incur by reason or in consequence of said bond; and it was also stipulated that in case of breach of the

contract or bond, said Albert Clement Tobin would set over and assign to plaintiff any and all retained percentages and sums due under said contract at the time of the breach, or which might thereafter become due; that in consideration of the application and the premium therein agreed to be paid, and the consideration provided in said contract, plaintiff did execute and deliver, as surety, a contract bond in the penal sum of $25,000.00, running to the United States of America, dated February 1, 1932, and conditioned for the performance of the contract covering said Carlinville Post Office building hereinabove described, and for the prompt payment to persons supplying the principal, Albert Clement Tobin, with labor and materials in the prosecution of the work provided in said contract, a photostatic copy of said defendant Albert Clement Tobin's application being hereto attached, marked Exhibit "B" and made a part hereof, also copy of bond is hereto attached, marked Exhibit "C"
12 and made a part hereof.

6. That the said bond was delivered to and accepted by the proper authorities of the Post Office Department for and on behalf of the United States of America; that thereafter the said Albert Clement Tobin was ordered and directed to proceed, and did proceed with the performance of the work set forth and described in said contract; that during the progress of the work provided under said contract, said defendant, Albert Clement Tobin, principal in the aforesaid bond, failed and refused to pay for labor and material used in the construction of the said Carlinville Post Office building and approaches aforesaid, and still refuses to pay for the same, and has permitted claims to be made against this plaintiff, surety on his bond on the work aforesaid.

7. Plaintiff has been informed and believes that said defendant, Albert Clement Tobin, has incurred obligations, which he has not paid, for labor and material aforesaid, in an amount in excess of $12,000.00; that of the estimated amount of work performed by the said defendant, Albert Clement Tobin, there is a substantial amount of money due from the United States Government under said contract, the exact amount of which is unknown to plaintiff, said amount constituting the balance due him under the estimates and retained percentages.

Plaintiff further states that it has been informed and believes that said defendant, Albert Clement Tobin, has submitted estimates for the months of December, 1932 and January, 1933, aggregating the sum of $10,448.10.

8. Plaintiff further states that it has been advised and demand has been made upon plaintiff for claims for labor and material furnished said defendant, Albert Clement Tobin, pursuant to said contract of the Carlinville Post Office building, in an amount in excess of $12,000.00, the majority of which claims plaintiff believes are valid and subsisting claims under the terms of said bond and a charge against this plaintiff.

9. That all the work required to be done by the above named defendant, Albert Clement Tobin, pursuant to the contract aforesaid between the defendant, Albert Clement Tobin, and the United States on the Carlinville Post Office building aforesaid, has been fully completed, and the plaintiff is informed and believes the same has been accepted by the United States Government, and has acknowledged in due and proper form its indebtedness to said Albert Clement Tobin under said contract for the amount still due to be paid under said contract, the exact amount of which is unknown to plaintiff.

10. Plaintiff further states that the said defendant, Guy S. Martin, was a former agent of the said plaintiff company, and authorized to execute bonds for and on behalf of the plaintiff, but that plaintiff, since the execution of the said bond aforesaid, has revoked and cancelled said power on the part of said defendant, Guy S. Martin, and that said defendant, Guy S. Martin, is no longer an agent of the said plaintiff.

Plaintiff further states that it has been informed and verily believes that said defendant, Albert Clement Tobin, has executed and delivered to said defendant, Guy S. Martin, a power of attorney in favor of said defendant, Guy S. Martin, for the collection of checks drawn on the Treasurer of the United States, as provided by Treasury Department Form 6569, in order to deprive this plaintiff of collecting the balance due under said contract, for the purpose of paying bills for labor and material still unpaid by the said defendant, Albert Clement Tobin; that plaintiff has been informed and verily believes that said defendant, Guy S. Martin, has delivered said power of attorney to the Treasury Department of the United States, and has collected thereunder the sum of $10,448.10, representing the estimates under said contract for the months of December, 1932 and January, 1933, and that said amount is now in the possession of the said defendant, Guy S. Martin.

Plaintiff further states that demand has been made upon said defendant, Guy S. Martin, to turn over said funds to said

plaintiff now in his possession, or to said defendant, Albert Clement Tobin, in order to pay the labor and material bills in excess of $12,000.00, but that said defendant, Guy S. Martin, has refused to pay over said amount, and has further refused to pay labor and material bills out of said fund of $10,448.10; that to allow said defendant, Guy S. Martin, with the aid and assistance of defendant, Albert Clement Tobin, to retain said $10,448.10, and to secure the balance of said funds due under said contract, as now allowed him under said power of attorney aforesaid, would perpetrate a fraud upon this plaintiff and all creditors of said defendant, Albert Clement Tobin, and would deprive this plaintiff of its right and lien on said funds, as well as deprive said creditors of said defendant, Albert Clement Tobin, of the payment of their claims for labor and material.

Plaintiff further states that unless said defendant, Guy S. Martin, is enjoined and restrained from disposing of said $10,448.10 now in his possession, without the payment of said creditors' claims, it would cause this plaintiff irreparable damage and injury, and would also deprive the creditors of said defendant, Albert Clement Tobin, from collecting their just debts for labor and material furnished under said contract aforesaid.

Plaintiff further states that to permit said defendant, Guy S. Martin, to retain authority under said power of attorney heretofore given to him by the said defendant, Albert Clement Tobin, to collect the balance due under said contract from the United States Government, would cause this plaintiff irreparable damage and injury and would deprive the creditors of said defendant, Albert Clement Tobin, from receiving payment of their claims for labor and material furnished under said contract aforesaid.

11. Plaintiff further states that defendant, Albert Clement Tobin, has violated the terms nad provisions of the application for said contract bond aforesaid, entered into between plaintiff and defendant, Albert Clement Tobin, by giving said power of attorney to defendant, Guy S. Martin, and by allowing said Guy S. Martin to collect the sum of $10,448.10 under said power of attorney aforesaid, contrary to the express provisions of said application, wherein it provided that said defendant, Albert Clement Tobin, in consideration of the execution of the bond by plaintiff, did assign, transfer and convey to plaintiff all deferred payments and retained percentages and any and all moneys and properties that may be due and payable to said defendant, Albert Clement Tobin, at any time, or in default of said contract.

12. That the defendants, Walter F. Brown, Postmaster General, Ogden L. Mills, Secretary of the Treasury, and Walter O. Wood, Treasurer of the United States, in their official capacities, are about to execute and deliver check of the United States in favor of the said defendant, Albert Clement Tobin, and/or Guy S. Martin, his attorney-in-fact, for the balance due under said contract, the exact amount of which is unknown to plaintiff, in full discharge of the obligation of the United States to the defendant, Albert Clement Tobin, under said contract aforesaid.

16 13. The plaintiff is informed and verily believes that said defendant, Albert Clement Tobin, is indebted to various persons, other than obligations incurred on the aforesaid Carlinville Post Office building, and that said defendant, Albert Clement Tobin, without plaintiff's consent, and in derogation of its rights intends to use and appropriate the moneys aforesaid due to him from the United States as retained percentages and final payment under said contract in paying creditors other than creditors for labor and material on said Carlinville Post Office building. Plaintiff states that it is entitled to have the sums due from the United States Government applied, first, to the payment of bills for labor and material incurred under said contract aforesaid in exoneration of its bond, prior to the payment of other obligations of the said defendant, Albert Clement Tobin.

14. Plaintiff further states that the said defendant, Albert Clement Tobin, has no assets of any value with which to pay the claims for material and labor furnished on said Carlinville Post Office building, and is unable to pay his obligations; that under its bond, as heretofore described, the plaintiff was equally bound to defendant, Albert Clement Tobin, for the payment of all bills for labor and material incurred by the said defendant, Albert Clement Tobin, in the construction of the said Carlinville Post Office building, and approaches aforesaid, in an amount in excess of $12,000.00; that inasmuch as plaintiff is liable for labor and material bills aforesaid, it has an equitable claim and lien upon the sum of $10,448.10 in possession of the said Guy S. Martin, and upon the balance of the unpaid contract price due said defendant, Albert Clement Tobin, and/or Guy S. Martin, his attorney-in-fact; and this plaintiff is advised and believes that it has the right to
17 receive said $10,448.10 in possession of the said defendant, Guy S. Martin, and the balance due under the said contract, and apply the same to the payment of labor and material bills incurred in the prosecution of the work aforesaid by the defendant, Albert Clement Tobin.

15. Plaintiff further states that this suit is brought to enforce a legal and equitable lien on the funds in possession or under the control of said defendants, Walter F. Brown, Ogden L. Mills and Walter O. Wood, for the construction of said Carlinville Post Office building, who are outside of the jurisdiction of this court, and by reason thereof plaintiff herein seeks to have substituted service of process directed against said defendants in conformity with Section 57 of the Judicial Code. Plaintiff is informed and believes and, therefore, avers that defendant, Walter F. Brown, as Postmaster General of the United States, is about to direct payment of said balance to be made to said defendants, Albert Clement Tobin, or Guy S. Martin, his attorney-in-fact, to the lasting and irrevocable loss of the plaintiff, unless this court intervenes to prevent such payment and orders that such sums and balance due under said contract be paid to the plaintiff, or to a receiver or receivers appointed by this Court.

16. Plaintiff is informed and believes that the defendant, Ogden L. Mills, as Secretary of the Treasury, is about to direct the payment of said balance to be made to said defendants, Albert Clement Tobin, or Guy S. Martin, his attorney-in-fact, to the lasting and irrevocable loss and injury of the plaintiff, unless this Court intercedes to prevent such and orders that said sum, or balance due under said contract, be paid to a receiver or receivers appointed herein.

18 17. Plaintiff is informed and believes, and, therefore, avers that the warrant, check and the fund from which the draft, warrant or check will be paid, are now within the jurisdiction of this court; that the defendants, Albert Clement Tobin or Guy S. Martin, are endeavoring to obtain possession of the same and are demanding the same from said Walter F. Brown, Ogden L. Mills and Walter O. Wood, or their authorized agents charged with the duty of making payment.

18. That the defendant, Walter O. Wood, Treasurer of the United States, is joined herein as a party, because the fund from which the draft, voucher or check will be paid is now in the treasury of the United States and subject to the direction and control of the defendant, Walter O. Wood, and in the regular course of business said payments will necessarily have to be directed by the defendants, Walter F. Brown and Ogden L. Mills and paid by Walter O. Wood, Treasurer of the United States.

Wherefore, the premises considered, the plaintiff prays as follows:

First: That a writ of subpoena may issue out of this court directed to said defendants, Albert Clement Tobin and Guy S. Martin, and substituted service of process, in accordance with Section 57 of the Judicial Code against said defendants, Walter F. Brown, Ogden L. Mills and Walter O. Wood, and each of them, commanding them and each of them to appear and answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived.

Second: That rule issue out of this court, directed to the defendants, Albert Clement Tobin, Walter F. Brown, Ogden L. Mills, Walter O. Wood and Guy S. Martin, to show cause, if any they have, why they should not be restrained and enjoined from paying to the defendants, Albert Clement
19 Tobin or Guy S. Martin, his attorney-in-fact, the unpaid balance due on account of the said Carlinville Post Office building, and requiring the said Albert Clement Tobin and Guy S. Martin to show cause, if any they have, why they should not be enjoined and restrained from receiving said fund, to-wit: the balance credited to the account of the defendant, Albert Clement Tobin, on account of the Carlinville Post Office building.

Third: That the defendant, Albert Clement Tobin, his agents, attorneys, attorneys-in-fact, assigns, executors and administrators may be enjoined from receiving the amount credited to him on account and owing to him for work done by him on the Carlinville Post Office building, or any part thereof, or any check or warrant for the same, and that the defendants, Walter F. Brown, Ogden L. Mills and Walter O. Wood, or their successors in office, be enjoined from issuing any voucher, check or warrant, and in case any such shall have been issued to the said Albert Clement Tobin, or his agents, attorneys, attorneys-in-fact or assigns, or any of them, on account of the Carlinville Post Office building, that said defendant, Albert Clement Tobin, or defendant, Guy S. Martin, his attorney-in-fact, be enjoined and restrained from disposing of any money heretofore received, especially the sum of $10,448.10, as aforesaid, cashing or endorsing any voucher, draft, order, check or warrant until further order of this court.

Fourth: That a temporary injunction or restraining order be issued against the defendants, Walter F. Brown, Ogden L. Mills and Walter O. Wood, enjoining and restraining them from approving for payment, and from paying in any manner whatsoever the balance, or any part thereof, on the contract price of the Carlinville Post Office building, credited to the de-

fendant, Albert Clement Tobin, or defendant, Guy S.
20 Martin, his attorney-in-fact, and that a temporary injunction or restraining order be issued against Albert Clement Tobin and Guy S. Martin, his attorney-in-fact, enjoining and restraining them from receiving any such draft, warrant, voucher or check issued in payment of the balance due from the United States on account of the Carlinville Post Office building.

Fifth: That a decree be entered directing said Walter F. Brown, Ogden L. Mills and Walter O. Wood, or their authorized agents, charged with the duty of making payment, to pay to the plaintiff herein the balance which has been credited by the Post Office Department as an amount due the said Albert Clement Tobin.

Sixth: That said defendant, Guy S. Martin, be ordered and directed to deliver to the Clerk of this Court any power of attorney which he may have heretofore received from the defendant, Albert Clement Tobin, for the purpose of receiving the balance of funds due on said Carlinville Post Office building, or if said defendant, Guy S. Martin, has transmitted and filed said power of attorney with the United States Treasury Department, that said Ogden L. Mills or Walter O. Wood be ordered and directed to produce said power of attorney in court, and that upon the trial of said cause on its merits that said power of attorney be cancelled and held for naught.

Seventh: That said defendant, Guy S. Martin, be ordered and directed to deliver to the Clerk of this Court, or to the receiver if one be appointed, the sum of $10,448.10, repre-
21 senting the balance which said defendant, Guy S. Martin, has unlawfully and wrongfully received from Walter O. Wood, Treasurer of the United States, covering the estimates for the months of December, 1932, and January, 1933, which amount is now in his possession, and that when so deposited the said fund be impounded for the protection of plaintiff herein and all creditors who have outstanding unpaid claims for labor and material furnished in the construction of the Carlinville Post Office building.

Eighth: That in the alternative, a receiver or receivers be appointed by this court, with full power and authority to collect from said Guy S. Martin, defendant, the sum of $10,448.10, heretofore unlawfully and wrongfully received by him under power of attorney executed by the said defendant, Albert Clement Tobin; that said receiver or receivers be authorized to sign final voucher and to demand and receive from the United States, or its proper officers, the full

amount of the fund credited by the Post Office Department to Albert Clement Tobin, and/or Guy S. Martin, his attorney-in-fact, on account of and in connection with the said Carlinville Post Office Building, and to hold and disburse the funds so received aforesaid by first making payment in full of all bills for labor and material incurred on the Carlinville Post Office building, to the extent of the funds so received from the United States in exoneration of plaintiff's bond herein and for the benefit and protection of plaintiff and of the creditors for labor and material incurred in the construction of said Carlinville Post Office building.

Ninth: That the plaintiff may have such other and further relief as the nature of the case may require,
22 and to the Court may seem meet and proper.

NATIONAL SURETY COMPANY,
By Fordyce, White, Mayne &
Williams,
Attorneys and Solicitors.

United States of America,
State of Missouri,
City of St. Louis—ss.

Walter R. Mayne, being first duly sworn on his oath, deposes and says that he is a member of the firm of Fordyce, White, Mayne and Williams, attorneys for the National Surety Company, plaintiff in the above entitled cause; and as such attorney and agent is authorized by plaintiff to make this affidavit; that he has knowledge and information and is acquainted with the matters and facts set forth in the annexed amended petition; that he has read the said amended petition and verily believes that the allegations contained therein are true, and as to such facts as stated upon information and belief he verily believes the same to be true.

WALTER R. MAYNE.

Subscribed and sworn to before me this 17th day of February, 1933.

MARTHA HARRIS,
Notary Public.

(Notarial Seal)

My commission expires May 11, 1935.

Received copy of the amended bill of complaint this 17th day of February, 1933.

CARTER, JONES & TURNEY,
Attorneys for Albert Clement Tobin.

CARTER, JONES & TURNEY,
Attorneys for Guy S. Martin.

Note: The exhibits referred to herein are attached to the original Bill of Complaint.

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23 Memorandum of Clerk: Exhibits A, B & C referred to in amended bill of complaint are omitted here for the reason that they are included in the summary of evidence.

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24 (Record Entry of Filing of Joint and Separate Return of Defendants, A. Clement Tobin, et al., to Order to Show Cause.)

(February 20th, 1933.)

Now come the parties by their respective solicitors; and defendants Albert Clement Tobin and Guy S. Martin, by leave of Court, file herein their joint and separate return to order to show cause; whereupon, the hearing on the application of plaintiff for temporary injunction against said defendants, Albert Clement Tobin and Guy S. Martin, and for appointment of Receiver is commenced, but not being concluded by the hour of adjournment, it is Ordered that further proceedings on said hearing be postponed until tomorrow at ten o'clock A. M.

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25 Hearing on Application for Temporary Injunction and for Appointment of Receiver Resumed and Concluded, and Submitted to the Court.

(February 21, 1935.)

Now come the parties in interest by their respective solicitors; whereupon the hearing on application of plaintiff for temporary injunction against defendants, Albert Clement Tobin and Guy S. Martin, and for the appointment of a Receiver is resumed and concluded, and such application submitted to the Court; thereupon, by leave of Court, the joint and separate return of said defendants, Albert Clement Tobin and Guy S. Martin, to order to show cause is amended by interlineation in accordance with memo filed.

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26 (Order Directing Issuance of Temporary Injunction and Restraining Order Against Defendants, etc.)

(Filed February 23, 1933.)

This cause coming on to be heard on order to show cause heretofore granted plaintiff under its verified bill of complaint why a temporary restraining order and injunction should not issue against said defendants, Albert Clement Tobin and Guy S. Martin, from receiving any further funds or payment due from the United States Government, under contract for the construction of the Post Office building at Carlinville, Illinois, and why a temporary restraining order and injunction should not issue against said defendants, Albert Clement Tobin and Guy S. Martin, from disposing of any of the funds heretofore received from the United States Government on account of the construction of the Post Office building at Carlinville, Illinois; and upon the evidence heard and submitted, and the arguments of counsel, the Court being fully advised in the premises Doth Order, Adjudge

27 And Decree that a temporary injunction and restraining order be issued against said defendants, Albert Clement Tobin and Guy S. Martin, jointly and severally, from receiving any further funds or payments from Walter F. Brown, Postmaster General of the United States, Ogden L. Mills, Secretary of the Treasury of the United States, or Walter O. Wood, Treasurer of the United States, or either of them, on account of the construction of the Carlinville, Illinois, Post Office building.

It Is Further Ordered, Adjudged And Decreed that the said defendant, Guy S. Martin, is hereby ordered and directed to pay, on or before the 6th day of March, 1933, the sum of $9000.00 to J. J. O'Connor, Clerk of the United States District Court, and the same amount shall be deposited by the Clerk until further order of court, and that until said amount aforesaid is paid to the Clerk of this court, the defendants, Albert Clement Tobin and Guy S. Martin are temporarily enjoined and restrained from disposing of any and all funds now in their possession or control which have heretofore been received by them, or either of them, from the defendants, Walter F. Brown, Postmaster General of the United States, Ogden L. Mills, Secretary of the Treasury of the United States and Walter O. Wood, Treasurer of the United States, or either of them, under contract for the construction of the Post Office building at Carlinville, Illinois.

It is further ordered that plaintiff herein file a good and sufficient bond in the sum of $2000.00 to be approved by this court, while this temporary restraining order and injunction is in force and effect.

Dated at St. Louis, Missouri, this 23rd day of February, 1933.

CHARLES B. DAVIS,
Judge U. S. District Court.

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28 Record entry of filing of joint and separate amended Answer of Defendants Tobin and Martin to Amended Bill of Complaint.

(March 27th, 1933.)

Now, there is filed herein joint and separate amended answer of defendants, Albert Clement Tobin and Guy S. Martin, to plaintiff's amended bill of complaint.

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29 Joint and Separate Amended Answer of Defendants Albert Clement Tobin and Guy S. Martin to Plaintiff's Amended Bill of Complaint.

(Filed March 27, 1933.)

Come now Albert Clement Tobin and Guy S. Martin, two of the defendants in the above entitled cause, and, leave of Court having been obtained, for their joint and separate amended answer to Plaintiff's amended bill of complaint, state and show the Court:

1. That said defendants admit the allegations in Paragraph 1 of plaintiff's amended bill.

2. That said defendants admit the allegations in Paragraph 2 of plaintiff's amended bill.

3. That said defendants admit the allegations contained in Paragraph 3 of plaintiff's amended bill of complaint, and admit that the plans for the work in the construction of the Carlinville Post Office building were provided for as in the contract referred to, a photostatic copy of which marked Exhibit "A" is attached to plaintiff's original bill.

4. That said defendants admit the allegations contained in Paragraph 4 of plaintiff's amended bill.

5. That said defendants admit the allegations in Paragraph 5 of plaintiff's amended bill, and admit that the terms of defendant Albert Clement Tobin's application for bond

and of the bond were as set out and contained in the copies thereof marked Exhibits "B" and "C", respectively,
30 attached to plaintiff's original bill.

6. That said defendants admit that the bond referred to in Paragraph 6 of plaintiff's amended bill was delivered to and accepted by the proper authorities of the Post Office Department for and on behalf of the United States of America, and that thereafter the defendant Albert Clement Tobin was ordered and directed to proceed and did proceed with the performance of the work set forth and described in the contract referred to; but these defendants deny that during the progress of the work provided for under said contract defendant Albert Clement Tobin, principal in the aforesaid bond, failed or refused to pay for labor and material used in the construction of the said Carlinville Post Office building, or its approaches, and these defendants deny that said Albert Clement Tobin now refuses to pay for the same, and deny that defendant Albert Clement Tobin has permitted claims to be made against plaintiff, surety on his bond on the work aforesaid.

7. That said defendants admit the allegations contained in Paragraph 7 of plaintiff's amended bill, and these defendants allege that they are informed and believe that there is now a balance due defendant Albert Clement Tobin from the United States of America of approximately Six thousand eight hundred dollars ($6,800.00).

8. That said defendants assert that they have not sufficient information to form a belief as to whether or not plaintiff has been advised of or that demand has been made upon plaintiff for claims for labor and material furnished defendant Albert Clement Tobin pursuant to said contract in an amount in excess of Twelve thousand dollars ($12,000), or as to whether or not the majority of such claims, if demanded, are valid and subsisting claims under the terms of the bond; but these defendants are informed and believe, and, therefore, allege that there are outstanding claims for labor and materials furnished defendant Albert Clement Tobin pursuant to said contract in excess of the amount of $12,000.00.

9. That said defendants admit that all the work required to be done by defendant Albert Clement Tobin pursuant to the contract aforesaid between said defendant and the United States on the Carlinville Post Office building has been fully completed, and that the same has been accepted by the
31 United States Government, and these defendants are informed and believe, and, therefore, allege that there

is now the sum of approximately Six thousand eight hundred dollars ($6,800.00) now due the said defendant Albert Clement Tobin by the United States Government.

10. That said defendants admit that defendant Guy S. Martin was a former agent of plaintiff company and authorized to execute bonds for and on behalf of the plaintiff, and admit that plaintiff, since the execution of the bond aforesaid, has revoked and cancelled said power on the part of defendant Guy S. Martin, and that said defendant Guy S. Martin is no longer an agent of the plaintiff; and these defendants admit that defendant Albert Clement Tobin has executed and delivered to defendant Guy S. Martin a power of attorney in favor of the latter for the collection of checks drawn on the Treasurer of the United States, but these defendants deny that this was in order to deprive plaintiff of collecting the balance due under the contract aforesaid for the purpose of paying bills for labor and material still unpaid by defendant Albert Clement Tobin; and these defendants allege that said power of attorney was executed and delivered by defendant Albert Clement Tobin to defendant Guy S. Martin for the purpose of permitting the latter to collect a check or checks of the United States Government, payable to defendant Albert Clement Tobin, and for the purpose of thereby repaying and refunding defendant Guy S. Martin in part for an indebtedness due him on open account by defendant Albert Clement Tobin in the sum of Eleven thousand, nine hundred thirty and 50/100 Dollars ($11,930.50) accrued to the date of March 15, 1933, and these defendants allege that there was on the said 15th day of March, 1933, an indebtedness due defendant Guy S. Martin by defendant Albert Clement Tobin of the sum of $1,482.40, the balance due, after receipt of the said check of the United States Government, for moneys theretofore advanced and paid to said defendant Albert Clement Tobin by said defendant Guy S. Martin on open account.

These defendants admit that defendant Guy S. Martin has delivered said power of attorney to the Treasury Department of the United States, and allege that the same was so delivered on the 28th day of December, 1932; and these defendants admit and allege that said defendant Guy S.
32 Martin has collected thereon the sum of Ten thousand, four hundred forty-eight and 10/100 ($10,448.10) dollars, representing the estimates under said contract for the months of December, 1932 and January, 1933; but these defendants deny that said amount in full is now in the possession of the said defendant Guy S. Martin, and allege that de-

fendant Guy S. Martin deposited or cashed the said check in the sum of Ten thousand, four hundred forty-eight and 10/100 dollars ($10,448.10) and that he received the proceeds thereof and applied the same in partial payment of the sum of Eleven thousand, nine hundred thirty and 50/100 dollars ($11,930.50) which these defendants say was lawfully due defendant Guy S. Martin from defendant Albert Clement Tobin for money advanced on open account by said defendant, Guy S. Martin to said defendant Albert Clement Tobin from July 10, 1927, to March 15, 1933, and that there is still due defendant Guy S. Martin from defendant Albert Clement Tobin on said open account, as of March 15, 1933, the sum of One thousand four hundred eighty-two and 40/100 ($1,482.40) Dollars all as evidenced and shown by the audit and report introduced in evidence at the trial of this cause and marked Defendant Martin's Exhibit "N".

That these defendants admit that defendant Guy S. Martin has refused, upon demand made upon him by plaintiff, to turn over to plaintiff said sum of Ten thousand, four hundred forty-eight and 10/100 dollars ($10,448.10) but these defendants deny that demand has been made upon said defendant Guy S. Martin to turn over said sum to defendant Albert Clement Tobin; and these defendants deny that the things and matters complained of in Paragraph 10 of plaintiff's amended bill would perpetrate a fraud upon plaintiff or upon creditors of defendant Albert Clement Tobin, and deny that, unless said defendant Guy S. Martin is enjoined and restrained from disposing of said sum of Ten thousand four hundred forty-eight and 10/100 dollars ($10,448.10) without the payment of said creditors' claims, that plaintiff would be caused irreparable damage and injury, or that the creditors of said defendant Albert Clement Tobin would be deprived from collecting their just debts for labor and/or materials furnished under said contract; and these defendants deny that to permit said defendant Guy S. Martin to retain authority under said power of attorney to collect the balance due under said contract would cause plaintiff irreparable
33 damage and injury, or would deprive the creditors of said defendant Albert Clement Tobin from receiving payment of their just claims for labor and/or materials furnished under said contract.

11. These defendants deny that defendant Albert Clement Tobin has violated the terms and provisions of the application for the contract bond referred to in Paragraph 11 of plaintiff's amended bill by giving said power of attorney to defendant Guy S. Martin, or by allowing said defendant Guy

S. Martin to so collect the said sum of Ten thousand four hundred forty-eight and 10/100 dollars ($10,448.10), and these defendants deny that such giving of said power of attorney or allowing said defendant Guy S. Martin to so collect said sum was contrary to the express provisions of said application, and these defendants assert that the assignment, transfer and conveyance to plaintiff of deferred payments and retained percentages provided for in said application and bond were conditional upon a default of said contract, and these defendants assert that defendant Albert Clement Tobin was not at any time and is not now in default of said contract.

12. That said defendants state that they have not sufficient information to form a belief as to whether or not defendants Walter F. Brown, Postmaster General, Ogden L. Mills, Secretary of the Treasury, and Walter O. Wood, Treasurer of the United States, in their official capacities, or their successors in office, are about to execute and deliver the check of the United States in favor of defendant Albert Clement Tobin, or in favor of defendant Guy S. Martin, his attorney-in-fact, for the balance due under said contract, and these defendants, therefore, deny the allegations contained in Paragraph 12 of plaintiff's amended bill, and these defendants assert, on information and belief, that there is a balance due under said contract from the United States to defendant Albert Clement Tobin of the sum of approximately Six thousand, eight hundred dollars ($6,800.00).

13. These defendants admit that defendant Albert Clement Tobin is indebted to various persons on other obligations than those incurred in the construction of the Carlinville Post Office building, but these defendants deny that defendant Albert Clement Tobin intends to use and appropriate the moneys aforesaid still due to him from the
34 United States in paying creditors other than creditors for labor and/or materials on said Carlinville Post Office Building.

14, 15 and 16. That said defendants deny the allegations contained in Paragraphs 14, 15 and 16 of plaintiff's amended bill.

17. That said defendants have not sufficient information to form a belief, and, therefore, deny that the warrant, check and the fund from which the draft, warrant or check will be paid, are now within the jurisdiction of this Honorable Court, and these defendants deny that defendants Albert Clement Tobin and Guy S. Martin, or either of them, are endeavor-

ing to obtain possession of the same, or are demanding the same from said Walter F. Brown, Ogden L. Mills and Walter O. Wood, or either of them, or their authorized agents charged with the duty of making payment.

For further answer to plaintiff's amended bill of complaint, these defendants say that they are ready and willing to have the sum of approximately Six Thousand Eight Hundred Dollars ($6,800.00) which they are informed and believe is still due defendant Albert Clement Tobin on said contract and still held by the United States Government, or whatever sum is still so due and so held, applied and used for the payment of proper and just claims for material and labor furnished defendant Albert Clement Tobin in the construction of the Carlinville Post Office Building; and these defendants say that the said sum still so due and so held is the deferred payment and retained percentage held by the United States Government under said contract and which as such is properly subject to an equitable claim and lien by plaintiff under the provisions of the 6th paragraph of the covenants of the Application for Contract Bond, photostatic copy of which is attached to plaintiff's original bill of complaint and therein referred to as "Exhibit B", at the time and in the event of breach or default in said contract by defendant Albert Clement Tobin.

For further answer, these defendants assert that they are ready and willing to have defendant Albert Clement Tobin, or this Honorable Court, cancel and revoke the said power of attorney heretofore received by defendant Guy S. Martin from defendant Albert Clement Tobin, and forwarded as aforesaid to the Treasury Department of the United
35 States, as the same applies or may apply to the sum still due on said contract and still so held by the United States Government, but these defendants assert that the appointment of a receiver or receivers to demand and receive from the United States or its proper officers the amount now held to the credit of defendant Albert Clement Tobin on account of and in connection with the said Carlinville Post Office Building, and to hold and disburse the same, would unnecessarily burden said fund with additional and unwarranted expense, and would accomplish no useful purpose which could not be as well accomplished either by defendant Albert Clement Tobin or plaintiff, or by said defendant and plaintiff together.

For their further answer, these defendants say that for and during the construction of the Carlinville Post Office Building by defendant Albert Clement Tobin, said defendant

received from and was advanced or charged by defendant Guy S. Martin various sums of money, on open account, for use in and expenses of said construction, all between the 19th day of February, 1932, and the 6th day of February, 1933, part of which sums were repaid from time to time, but which on the 6th day of February, 1933, were unpaid by defendant Albert Clement Tobin and still owing to defendant Guy S. Martin to the aggregate amount of Ten Thousand Four Hundred Five and 65/100 Dollars ($10,405.65), including interest on said open account to February 1, 1933, of $232.86; that all of said various sums of money were properly and in good faith advanced or charged by defendant Guy S. Martin for expenses incurred or paid by defendant Albert Clement Tobin in financing the construction of said building; that to secure and to provide for the repayment of this indebtedness on said open account, defendant Albert Clement Tobin executed and delivered to defendant Guy S. Martin the power of attorney aforesaid, and assigned to him the right to collect and receive and authorized him to endorse and deposit the check due and owing defendant Albert Clement Tobin by the United States Government on the December, 1932, and January, 1933, estimates under the contract aforesaid; that pursuant to such power of attorney, assignment and authority, and for the purpose of obtaining payment from defendant Albert Clement Tobin for his said indebtedness, defendant Guy S. Martin did, on the 7th day of February, 1933, collect and receive said check of the United States Government in the sum of Ten Thousand Four Hundred Forty-Eight and
36 10/100 Dollars ($10,448.10), and that he did on said date endorse and cash the same and cause the proceeds thereof to be applied to the indebtedness of defendant Albert Clement Tobin on said open account, all with the approval and authority of said defendant Tobin.

These defendants further say that by said application of said proceeds, defendant Guy S. Martin received payment of the indebtedness aforesaid, and that said defendant now holds to the credit of defendant Albert Clement Tobin, on said open account of money so advanced between February 19, 1932 and February 6, 1933, the sum of Forty-Two and 45/100 Dollars ($42.45), the difference between the amount of said indebtedness and the amount of the proceeds of said check; that all of said open account, and the details of the sums advanced, charged and credited therein, are shown in the audit and report introduced in evidence at the trial of this cause and made a part of the record therein and marked Defendant Martin's "Exhibit O".

For their further return, these defendants say that defendant Guy S. Martin was justly entitled to receive the proceeds of the said check and to apply the same in the manner and for the purposes aforesaid, and that he is justly and equitably entitled to retain the same, except for the said balance of $42.45, in discharge of said indebtedness and in discharge of the sums so advanced and charged for the purpose of financing defendant Albert Clement Tobin in the work of constructing the Carlinville Post Office Building under said contract; that said defendant Martin had both a legal and equitable claim and lien to such proceeds superior or at least equal to that, if any, plaintiff may have had before said check was delivered by the United States Government, and that said defendant Martin should not now be disturbed in his possession of said proceeds or deprived of his vested and executed rights thereto.

Wherefore, these defendants, having fully answered, pray that the order to show cause and the temporary injunction and restraining order heretofore issued herein be discharged; that the order heretofore issued directing defendant Guy S. Martin to pay the sum of $9,000.00 to the Clerk of this Court be vacated and discharged; that J. J. O'Connor, Clerk of the United States District Court, be directed to return and
37 pay over to defendant Guy S. Martin the said sum of $9,000.00 heretofore deposited pursuant to order of this Court on the 6th day of March, 1933; that plaintiff's original and amended bills of Complaint may be dismissed; that these defendants recover their costs herein, and that these defendants may have such other and further relief as to the Court may seem meet, proper and just.

CARTER, JONES & TURNEY,
RICHARD S. BULL,
Solicitors for defendants Albert Clement Tobin and Guy S. Martin.

Receipt of copy of the foregoing amended answer acknowledged this ..... day of March, 1933.

FORDYCE, WHITE, MAYNE & WILLIAMS,
Solicitors for Plaintiff.

38 (Findings of Fact and Conclusions of Law of District Court.)

(Filed April 27, 1933.)

Findings of Fact.

1. On February 12, 1932, defendant Tobin entered into a contract with the Government to furnish all labor and materials and perform all work required for the construction of a post office building at Carlinville, Illinois, for the consideration of $49,500.00.

2. To secure the faithful performance of this contract, the plaintiff became the surety on a bond in the sum of $25,000, executed by defendant Tobin, one of the conditions of which was that the contractor "shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract". This provision is required by statute 40 U. S. C. A. 270.

3. The contract provided among other things that partial payments should be made to the contractor as the work progressed at the end of each calendar month on approved estimates; that in making such partial payments there should be retained ten per cent. on the estimated amount until final completion and acceptance of all the work.

4. The defendant Tobin in the application for the performance bond, among other things, agreed with the surety as follows:

"3rd. That the undersigned will at all times indemnify and keep indemnified the Company, and hold and save it harmless from and against any and all liability, damages, loss costs, charges and expenses of whatever kind or nature, including counsel and attorneys' fees, which the company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the Company of any and all other bonds executed, for us at our instance and request, and that we will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money which the Company or its representatives shall pay or cause to be paid, or become liable to pay, on account of the execution of any such instrument, and on account of any liability, damage, costs, charges and expenses of whatsoever kind or nature, as well, also, in connection with any litigation, investigation, collecting any premium due or losses sustained or other matters connected therewith, including counsel and attorney's fees, such payment to be made to the

Company as soon as it shall have become liable therefor, whether the Company shall have paid said sum or any part thereof or not."

"6th. That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said bond."

"7th. That in the event the Company is required to reserve from its assets an amount to cover any contingent claim or claims under the bond herein applied for, by reason of default of the undersigned, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason
39 whatsoever, the undersigned hereby covenants and agrees to immediately on demand deposit with the company, in current funds, an amount sufficient to cover any such contingent claim or claims, as a trust fund or collateral security, to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument; and if the company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including counsel or attorney's fees, which it may thereby incur, shall be included in such action and paid by the undersigned."

5. The defendant Martin was, at the time of the execution of the bond, an agent of the plaintiff and in that behalf executed the performance bond contrary to the instructions of his superiors. The premium on the bond was never paid.

6. The defendant Tobin had, shortly prior to the construction of the Post Office at Carlinville, Illinois, constructed a similar building for the Government at Havana, Illinois, and the surety on the performance bond was obliged to assume the payment of certain claims in connection with the same. The defendant Martin advanced the defendant Tobin funds from time to time to enable him to carry on the work of constructing both of these buildings.

7. In December, 1932, when the work of constructing the building at Carlinville was nearing completion, defendant Tobin was indebted to defendant Martin in a sum in excess of $10,000 for money loaned. At that time, there was also due to various persons who furnished labor and materials for the construction of the building at Carlinville, Illinois, the sum of about $15,000. Defendant Tobin and Martin knew that there were outstanding a large number of such unpaid bills, but the exact number and amount of the same were probably not known to said defendants.

8. Confronted with this situation defendant Tobin, in December, 1932, gave to defendant Martin a power of attorney authorizing him to collect from the Government the balance due and payable on the Carlinville contract.

9. The final estimate covering work done and materials furnished in the construction of the building was $10,448.10. The approved estimate was given by defendant Tobin to defendant Martin, who, on February 4, 1933, personally made a trip to Washington and on February 6, 1933, collected the said sum and sought to apply the same to the indebtedness of defendant Tobin.

10. Defendant Martin was at all times fully advised as to the terms and conditions of the building contract, the performance bond and the application for the said bond.

The Carlinville building has been substantially, but not entirely, completed, and has been occupied but not formally accepted by the Government.

11. The total amount still due defendant Tobin from the Government on account of the construction of the building in question is approximately $5700. The total amount of outstanding bills for labor and materials is in excess of $15,000.

12. In compliance with an order of Court, defendant Martin paid $9000 of the said sum into the registry of the Court, and still holds the balance of $1448.10.

13. Defendant Tobin is insolvent.

Conclusions of Law.

1. The purpose of the statute above mentioned requiring the form of performance in evidence in this case was to provide workmen and material men a security similar to that afforded by the lien laws of the States.

2. A surety on such a statutory performance bond, who has become legally liable to pay the claims of laborers and ma-

terial men, and who has paid the same, becomes subrogated to the right of the principal, whose obligation he has satisfied to collect the unpaid balance due on the contract from the Government. Henningsen vs. U. S. F. & G. Co., 208 U. S. 404; Prairie State Bank vs. U. S., 164 U. S. 227; Cox vs. New England Equitable Ins. Co., (CCA 8) 247 F. 955; Southern Surety Co. vs. Holden Lbr. Co., (CCA 8) 14 F. (2d) 411.

3. The contract with the Government obligated defendant Tobin to furnish all labor and materials and perform all work required for the construction of the building in question. It was necessarily an implied provision of the contract that in due course the said defendant would pay for such labor and materials.

4. The performance bond expressly required the said defendant to promptly pay all persons who supplied labor and materials for the said building, and the failure so to do constituted a breach and default in the performance of the contract.

5. The defendant Tobin was in default, and had breached the contract at the time he gave defendant Martin a power of attorney to collect money from the Government in December, 1932, and this condition prevailed at the time defendant Martin collected the sum of $10,448.10 from the Government on February 6, 1933.

6. Plaintiff was, in December, 1932 and is now, liable for the payment of the unpaid bills for materials and labor.

40 7. By the terms of the application for the said bond, and particularly sections 3 and 6 thereof, defendant Tobin, principal in the bond, assigned and transferred to the plaintiff, surety in the bond, all deferred payments, retained percentages and all money that might be or become payable to the said principal at the time of any breach or default in the performance of the contract, as the sole property of the surety to be applied on any loss sustained; and that by virtue of this agreement, and the breach and default of the said defendant, the plaintiff is entitled to have available all sums of money due from the Government to the said defendant in December, 1932, and subsequent thereto, including the sum of $10,448.10 collected by defendant Martin pending the adjustment and payment of the labor and material bills.

8. Plaintiff is entitled to an injunctive decree directing defendant Martin to pay the balance of the amount collected from the Government, that is $1448.10, into the registry of the court, to abide further orders as to the disposition of the fund.

9. The motion of defendants Walter F. Brown, Postmaster General, and Ogden L. Mills, Secretary of the Treasury, to dismiss the plaintiff's bill as to such defendants, should be sustained, as the facts pleaded do not authorize service upon them under section 57 of the Judicial Code.

CHARLES B. DAVIS,
U. S. District Judge.

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41 Order and Decree.

(Filed May 2, 1933.)

This cause coming on to be heard for final hearing on the 17th day of March, 1933, upon the pleadings heretofore filed by the respective parties, the evidence submitted, arguments and briefs of counsel, and the Court being fully advised in the premises before filing its findings of fact and conclusions of law in the case, the Court

Doth Order, Adjudge And Decree as follows:

1. That the temporary restraining order and injunction heretofore issued against said defendants, Albert Clement Tobin and Guy S. Martin, from receiving any further funds or payments due from the United States Government, its officials and agents, under the contract dated February 12, 1932, between Albert Clement Tobin, an individual trading as A. Clement Tobin & Company, and the United States Gov-
42 ernment for the construction of the Post Office Building at Carlinville, Illinois, is hereby made permanent, and said defendants, Albert Clement Tobin and Guy S. Martin, their agents, attorneys, assigns, executors or administrators, are perpetually restrained and enjoined from collecting any and all balances or funds due from the United States Government, through its officials and agents, under said contract aforesaid for the construction of the Post Office Building at Carlinville, Illinois.

2. That plaintiff, National Surety Company, is hereby authorized and empowered to collect, receive and receipt for, either in its name or in the name of Albert C. Tobin and/or Guy S. Martin, his attorney-in-fact, any funds or payments still due from the United States Government, through its officials and agents, on account of the construction of said Post Office Building at Carlinville, Illinois, under contract as aforesaid, and upon collection thereof plaintiff is ordered and directed to deposit the same with J. J. O'Connor, Clerk of this Court, to abide further orders as to the disposition of said funds.

3. That said defendant, Guy S. Martin, is ordered and directed to pay on or before the 20th day of May, 1933, the sum of Fourteen Hundred Forty-eight and 10/100 Dollars ($1448.10) to J. J. O'Connor, Clerk of this Court, the same to be deposited by the Clerk of said Court with the Nine Thousand Dollars ($9,000.00), heretofore ordered paid into Court by the defendant, Guy S. Martin, said deposit to abide further orders as to the disposition of said fund.

4. That plaintiff's bill of complaint directed against Walter F. Brown, Postmaster General, Ogden L. Mills, Secretary of the Treasury, and Walter O. Woods, Treasurer of
43 the United States, is dismissed as to said defendants, and that said defendants collect their costs, the same to be taxed in this cause.

5. The Court reserves the right to enter such further orders and decrees in this cause as may be necessary in the premises.

6. The costs of this cause are to be taxed against said defendants, Albert Clement Tobin and Guy S. Martin.

CHARLES B. DAVIS,
Judge of the United States District Court, for the Eastern Division of the Eastern Judicial District of Missouri.

Entered at St. Louis, Missouri, this 2nd day of May, 1933.

Approved as to form.

CARTER, JONES & TURNEY,
RICHARD S. BULL,
Solicitors for Defendants, Tobin and Martin.

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44 Record Entry of Withdrawal of Messrs. Carter, Jones & Turney, Richard S. Bull and Oliver F. Erbs, as Counsel for Defendant Tobin.

(Entered June 5, 1933.)

Now, come Messrs. Carter, Jones & Turney, Richard S. Bull and Oliver F. Erbs, and by leave of Court withdraw as counsel for defendant, Albert Clement Tobin. And now, by consent of parties, it is Ordered that the motion of Edwin Tobin, Sr. for leave to intervene, etc., be, and the same is hereby, continued to the next motion day.

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45 Petition for Order Fixing Time for Filing Claims.

(Filed January 23, 1934.)

Comes now the National Surety Company, plaintiff herein, and states and shows to the Court that after the trial of this cause and the decree herein made on the 2nd day of May, 1933, additional claims were filed against defendant Albert Clement Tobin, for labor performed and materials furnished under the contract for the construction of the United States Post Office building at Carlinville, Illinois, and after a thorough examination and audit of defendant Tobin's records it has been found, as shown by the annexed schedule of claims, that there are fifty claims which apparently are undisputed, amounting to $14,973.06; that defendant Guy S. Martin is asserting a general claim for money loaned said defendant Tobin to pay for labor and materials used in the construction of the Carlinville Post Office, which, as shown by an audit introduced in evidence at the trial of this cause as "Defendant Martin's Exhibit O", amounts to $9,430.29; that several of the claims set forth on the annexed schedule of claims are disputed, either because of defective materials or workmanship supplied by such claimants and used in the construction of said building, or because the amount of the claim is in dispute, and it may become necessary to effect an adjustment thereof either by voluntary settlement between all of the interested parties or by litigation of such claims; that the disputed claims total the sum of $21,903.23; and that the total of all claims being asserted for labor and material furnished to said Post Office Building, including both disputed and undisputed claims, aggregate the sum of $36,876.29.

46 That there is now on deposit with the Clerk of this Court the sum of $9968.35, and there is due defendant Tobin from the United States Treasury Department an additional sum of approximately $5700.00, payment of said sum, however, is being withheld by the United States Government pending the final inspection and approval of said building, and it will, therefore, be necessary for the Court to distribute the fund now on deposit with the Clerk of this Court and by appropriate order secure payment from the Treasury Department of said sum of $5700.00 for additional distribution to claimants.

That the attorneys for plaintiff and defendant Albert Clement Tobin, have performed services in securing and conserving the funds available for payment of creditors, and in the adjustment, settlement and elimination of unjust claims,

and they will be required to perform additional services in securing the additional sum due from the United States Government and the distribution of such funds to the creditors; and because the plaintiff and defendant Tobin are without funds they will be unable to obtain payment for such services and expenses, and they are, therefore, entitled to reasonable compensation for such services and expenses from the funds now on deposit.

Wherefore, Plaintiff prays the Court to make an order directing the Clerk of this Court to pay out of the fund of $9968.35 on deposit with him, the sum of $75.00 deposited by plaintiff for Court costs in this case; that the Court allow such sums for attorneys' fees herein as to the Court may seem proper; that the Court enter its order requiring the payment into the Registry of this Court of the balance due from the United States Government under said contract; that the Court enter an order requiring all persons having any claim against the fund in the Registry of this Court, including all claimants having claims denominated either disputed or undisputed in the schedule hereto attached, to file their claims herein within a time and upon such conditions as shall be fixed by the Court, and for such other and further orders and decrees as may be proper.

47 FORDYCE, WHITE, MAYNE & WILLIAMS,
Attorneys for Plaintiff.

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48 Memorandum of Clerk: The schedule of claims referred to in the Petition for Order Fixing Time for Filing Claims are here omitted at the suggestion of counsel for appellant for the reason that the same is not pertinent to this appeal.

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49 Order Fixing Time For Filing Claims.

(Filed January 24, 1934.)

Now at this day, this cause coming on for hearing upon the petition of plaintiff, National Surety Company, a corporation, for an order fixing the time for filing claims herein; and it appearing to the Court that all the parties hereto except Guy S. Martin, and a majority of the parties having claims for furnishing labor and material to A. Clement Tobin for use in the Post Office Building at Carlinville, Illinois, having consented thereto, it is

Ordered that all parties claiming any right, title or interest in and to the fund in the Registry of this Court, be and they are hereby required to file verified claims herein on or before the 24th day of March, 1934; and that any parties, plaintiff, defendant, or claimants who have any objections to any claims so filed within the time above prescribed, be and they are hereby granted to and including the 3rd day of April, 1934, to file such objections and exceptions to such claims.

It is further ordered that a copy of this order be mailed on or before March 1, 1934, to every party who is known to have a claim against the fund in the Registry of this Court as set forth in the schedule of claims attached to the petition for Order fixing time for filing claims, and that a
50 copy hereof be published once a week for three weeks in the St. Louis Daily Record and also in some newspaper of general circulation in the City of Carlinville, Illinois, or if there be a newspaper of general circulation in the City of Carlinville, Illinois, then in some newspaper of general circulation in Macoupin County, Illinois, the last insertion thereof to be published before March 1st, 1934.

It is further ordered that this Court retain jurisdiction herein to make such other and further orders touching the matters presented by the foregoing petition of the National Surety Company and such other and further orders respecting the disposition of the fund in the Registry of this Court, as shall be proper.

CHARLES B. DAVIS,
Judge.

St. Louis, Missouri,
January 24th, 1934.

Pursuant to the within order of Court, I, Jas. J. O'Connor, Clerk of Court, do certify that on January 29, 1934 I mailed a copy of this order to each claimant whose name appears upon the list filed herein on the 23rd day of January, 1934.

JAS. J. O'CONNOR,
Clerk of Court.

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51 Exceptions, and in the Event They are Overruled, Proof of Debt, of Guy S. Martin.

(Filed March 24, 1934.)

At St. Louis, in the State of Missouri, on the 21st day of March, 1934, came Guy S. Martin, and says:

1. That he resides at El Dorado, Saline County, Illinois, and hereinafter designates himself as "Claimant".

2. That said claimant is doing business in the States of Illinois and Missouri, and that affiant is duly authorized to make this proof;

3. That said claimant hereby objects and excepts to the order of this Honorable Court entered in this cause on January 24th, 1934, ordering and directing all persons, firms and corporations having or claiming to have any right, claim, title or interest in and to the fund heretofore paid into the registry of this court by Guy S. Martin, pursuant to order of court heretofore made in this cause, to file verified claims herein on or before March 24th, 1934, for the reasons that this claimant, under and by virtue of that certain assignment in his favor made by A. Clement Tobin and under and by virtue of said money having been paid to affiant prior to the institution of this suit, is entitled to all of the money heretofore, pursuant to said court order, paid into the registry of this court by him, and that no persons, firms or corporations other than this claimant, Guy S. Martin, and particularly none of the persons, firms or corporations who furnished labor, materials or supplies for the construction of the Carlinville Postoffice Building, and who thereby assert any claim against plaintiff herein, National Surety Company, as surety for said A. Clement Tobin under his contract for such construction, have or can have any right, claim, title or interest in or to the fund aforesaid, and
52 this claimant and affiant says that said payment of money into the registry of this Honorable Court was made by affiant over his protest and without his consent thereto, and affiant again renews his objections and exceptions to the order of court in so ordering affiant to pay said money theretofore paid over to him into the registry of this court, and said claimant and affiant claims the entire fund of $10,448.10 as his own money and as his sole and absolute property, free and clear of any rights of said Tobin or anyone claiming by, through or under him.

4. That in the event the objections and exceptions of affiant to the orders of court herein made, as hereinabove specifically set out, are overruled by this court, or any appellate court to which the matter may be presented, then and in that event affiant desires to file this, his proof of claim in this cause.

That A. Clement Tobin was and still is indebted to claimant in the sum of $10,405.65.

That the consideration of said debt is as follows:

Payments for labor and material bills advanced by claimant on behalf of said Tobin at his special instance and request, for which said Tobin promised to repay plaintiff, together with express and freight charges advanced by claimant for the purpose of enabling said Tobin to receive and thereafter install materials so sent by express or freight in the U. S. Postoffice Building at Carlinville, Illinois, in accordance with the terms of the contract of said Tobin with U. S. Government, dated February 12th, 1932, together with reasonable expenses incurred by claimant in the assistance of said Tobin in performing his said contract for labor and material as aforesaid, with a reasonable charge for interest on amounts advanced to carry out said purposes, up to February 1st, 1933, an itemized statement of which account is as follows:

		Dr.	Cr.	Balance
1932				
Feb. 19,	Bond—Carlinville Post Office	$ 742.50	$	$
Apr. 2,	Cheque (Tower Grove Bank and Trust Co.)	300.00		
8,	Cheque (Tower Grove Bank and Trust Co.)	200.00		1,242.50
May 5,	Cheque (Banking House of C. H. C. Anderson)	150.00		
21,	Cheque (Tower Grove Bank and Trust Co.)	400.00		1,792.50
June 23,	Cheque (Tower Grove Bank and Trust Co.)	1,500.00		
30,	Cheque (Tower Grove Bank and Trust Co.)	450.00		3,742.50
July 8,	Riot Bond—#70 Home Insurance Co.	9.00		
11,	Cheque (Tower Grove Bank and Trust Co.)	600.00		
29,	Harry Sandman	165.00		4,516.50
Aug. 8,	Cheque (Tower Grove Bank and Trust Co.)	200.00		
13,	Cheque (Tower Grove Bank and Trust Co.)	115.00		
13,	Cheque—On Account		115.00	
19,	Cheque Returned	115.00		
26,	Cheque Redeposited		115.00	4,716.50

58		Dr.	Cr.	Balance
	Balance Brought Forward	$	$	$4,716.50
1932				
Sept. 3,	Cheque (Carlinville National Bank)	725.00		
6,	Telegram—Carlinville, Ill.	.30		
30,	Additional Endorsements—#70 Home Insurance Co.	18.39		5,460.19

Oct. 11,	Bond—Freight Charge	5.00		
12,	Cheque (Tower Grove Bank and Trust Co.)	600.00		
14,	Cheque—On Account		600.00	
15,	Cheque Returned	600.00		
26,	Contractors' Contingent Liability Bond	24.00		
31,	Cheque Redeposited		600.00	
	Cheque Returned	600.00		
	Cheque (Tower Grove Bank and Trust Co.)	300.00		6,389.19
Nov. 2,	Additional Endorsement — #70 Home Insurance Co.	3.06		
5,	Cheque (Tower Grove Bank and Trust Co.)	300.00		
9,	Cheque (Tower Grove Bank and Trust Co.)	350.00		
15,	U. S. 370551—Deposit—Compensation	200.00		
	L. C. 39583—Deposit - Public Liability	12.00		
16,	Cheque (Tower Grove Bank and Trust Co.)	75.00		
19,	Cheque (Tower Grove Bank and Trust Co.)	700.00		8,029.25
Dec. 1,	Telephone—Alton, Ill.	.25		
3,	Telephone—Alton, Ill.	.40		
7,	Cheque (Tower Grove Bank and Trust Co.)	500.00		
10,	Cheque (Tower Grove Bank and Trust Co.)	300.00		8,829.90
1933				
Jan. 6,	Cheque (Tower Grove Bank and Trust Co.)	700.00		
10,	Cheque (Tower Grove Bank and Trust Co.)	300.00		
16,	Telegram—Carlinville, Ill.	.30		
	Telegram—Alton, Ill.	.25		
21,	Cheque (Tower Grove Bank and Trust Co.)	160.00		
26,	Cheque (Tower Grove Bank and Trust Co.)	50.00		
31,	Cash—Advance	10.00		10,050.45
Feb. 6,	Expenses—Trip to Washington, D. C.	122.34		10,172.79
7,	Interest on Open Account to Feb. 1, 1933	232.86		10,405.65

54 That no part of said debt has been paid, except that this claimant, Guy S. Martin, heretofore received the aforesaid sum of $10,448.10 which he was ordered by this court to deposit and which he did deposit in the registry of this court under the circumstances hereinbefore recited and

heretofore appearing; that there are no offsets or counterclaims to the same; and that this deponent has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for said claimant's use, had or received any manner of security for said debt whatever, nor has any judgment been rendered therefor, or for any part thereof, nor has any note or other evidence of said debt been received.

Affiant further states that according to his best knowledge, information and belief all of the items of the account hereto attached were furnished to and for, and the materials and labor paid for actually entered into construction of, the post-office building at Carlinville, Illinois; that no parties have furnished any labor or material to this claimant for use in said building.

Affiant further states that the account hereto attached and any and all other documents attached as exhibits are true and correct; that the balance claimed to be due this claimant is in fact due, and that there has been no agreement entered into between this claimant and any other party whomsoever with respect to improperly increasing the account of this claimant in any manner whatsoever.

GUY S. MARTIN.

State of Missouri,
City of St. Louis.—ss.:

Guy S. Martin, being first duly sworn, upon his oath states that he is the party who signed the above and foregoing claim; that he has read over the above and foregoing claim, that he is familiar with the contents thereof, and that all of the matters and things therein are true and correct.

GUY S. MARTIN.

Subscribed and sworn to before me this 24th day of March, 1934.

My Commission Expires: June 30, 1935.

(Seal)

OLIVER F. ERBS,
Notary Public, City of St. Louis, Missouri.

CARTER & JONES and
R. S. BULL,
Attorneys for Claimant.

55 Exceptions of Alton Brick Company To Claim of Guy S. Martin.

(Filed April 3, 1934.)

Now at this day comes Alton Brick Company, a corporation, one of the claimants herein and excepts and objects to the claim of Guy S. Martin filed herein on the 24th day of March, 1934, for the sum of $10,405.65, denies each and every allegation therein contained, and further states that said claim is improper, unjust and not chargeable against the fund in Court herein, as this exceptor is informed and believes, for the following reasons:

1. Because the items set forth in said account, are not chargeable against the fund in the Registry of this Court herein;

2. Because said claim consists of items of moneys claimed to have been advanced which are not chargeable against the fund in the Registry of this Court;

3. Because said claimant did not in fact furnish any material or labor to the U. S. Post Office Building at Carlinville, Illinois, and therefore under the decree of this Court is not entitled to share in the fund in the Registry of this Court;

4. Because said claim as filed is indefinite and uncertain;

5. Because it appears on the face of said claim that certain items claimed to have been advanced by said claimant were not in fact advanced as the parties to whom claimant claims to have made certain payments, have filed claims herein, duly verified, wherein they allege that nothing has been paid upon their claims;

6. Because all questions as to the merits of the claim of Guy S. Martin have been heretofore passed upon by the Court, and the finding and decree of the Court heretofore entered herein has finally adjudicated any and all claims which said claimant may have or could have against the funds in the Registry of this Court.

Wherefore this exceptor prays this Honorable Court to require strict proof of said claim, and upon a hearing thereof disallow said claim.

OTTO O. FICKEISSEN,
Attorney for Alton Brick Co.

State of Missouri,
City of St. Louis.—ss.:

Otto O. Fickeissen, being first duly sworn upon his oath states that he is agent and attorney for Alton Brick Com-

pany, exceptor in the above exceptions, and as such is duly authorized to make his oath, and being first duly sworn upon his oath states that he has read over the above and
56 foregoing exceptions and that the matters and things therein stated are true to the best of his knowledge, information and belief.

OTTO O. FICKEISSEN.

Subscribed and sworn to before me this 3rd day of April, 1934.

My term expires March 1st, 1935.

(Seal)

ELBA H. GIBSON,
Notary Public, City of St. Louis, Missouri.

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57 (Memorandum of Clerk of District Court as to omission of Other Exceptions to Proof of Claim of Guy S. Martin.)

Memorandum of Clerk: Other exceptions to proof of claim of Guy S. Martin are omitted at the suggestion of counsel for appellant for the reason the same are similar to the exceptions of Alton Brick Co. See Item 14 of the praecipe for transcript.

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58 Objections and Exceptions of Defendant Guy S. Martin to Claims Filed Herein and to Allowance Thereof.

(Filed April 3rd, 1934.)

Comes now Guy S. Martin, one of the defendants herein, by his attorneys and solicitors, and, pursuant to the order of this Honorable Court heretofore, on the 24th day of January, 1934 entered herein directing that any parties plaintiff, defendant or claimants who have any objections to any claims filed herein in accordance with said order, files such objections and exceptions on or before the 3rd day of April, 1934, but reserving each and every right this defendant, Guy S. Martin, may have to object and except to the issuance and entry of said order and to any further orders, decrees or judgments issued, made or entered thereunder, files these his objections and exceptions to each and all of the claims filed by the several claimants herein pursuant to said order of the 24th day of January, 1934, excepting only the certain objections and exceptions, and in the event of their being overruled, the claim and proof of debt filed herein by this defendant,

Guy S. Martin, on the 24th day of March, 1934; and for his objections and exceptions thereto this defendant states and shows the Court:

1. That none of the persons or parties so filing said claims, excepting this defendant, Guy S. Martin, has or can have any right, title or interest in or to the fund in the Registry of this Court.

2. That the fund in the registry of this court is not subject to any of said claims so filed and is not subject to dis-
59 bursement or distribution therefor by this Court in this proceeding, to any alleged claimant excepting only this defendant, Guy S. Martin.

3. That this Honorable Court was without authority in this proceeding to enter or make said order of the 24th day of January, 1934, ordering, requiring or permitting claims to be filed herein to the fund in the Registry of this Court.

4. That this Honorable Court has no authority in this proceeding to allow any of the claims so filed or to allow the filing thereof herein.

5. That under the pleadings and evidence in this proceeding, and under the law applicable thereto, this Honorable Court is limited to determining whether or not the plaintiff herein, National Surety Company, has any right, title, interest or equity in or to the fund in the Registry of this Court, to the extent claimed by said plaintiff herein, and may not legally hear or determine whether the claims aforesaid so filed herein should be allowed or paid out of said fund.

6. That all of said claims so filed herein, excepting that of this defendant, Guy S. Martin, and to the extent that they are for materials, supplies or labor actually furnished for and which entered into the construction of the postoffice building at Carlinville, Illinois, should and must properly and only be filed with and against the plaintiff herein, National Surety Company or its successor as receiver, surety on the bond furnished by defendant A. Clement Tobin in such construction.

7. That there is reason for this defendant and for this Honorable Court to believe, as evidenced by the claim or proof of debt filed herein on the 24th day of March, 1934, by Ideal Floor Co., Inc., and by the affidavit of its president, John H. Chamblin, made in connection therewith, that defendant A. Clement Tobin has endeavored to have, and in some instances has succeeded in having, his creditors present bills, and possibly to file claims herein, which are excessive, incorrect, and fraudulent, with the hope and for the purpose of consuming

the fund in the Registry of this Court or a large portion thereof to the prejudice of and in fraud of the rights of this defendant, Guy S. Martin, and this defendant states that, as a result of such wrongful, illegal and fraudulent conduct on the part of defendant A. Clement Tobin, it is and will be impossible for this Honorable Court to determine truly and correctly the accurate or rightful amount owed by defendant A. Clement Tobin to any of his creditors who have so filed said claims herein.

8. That all claims so filed, excepting that of this defendant, are improper, fraudulent, unjust, excessive and violative of this defendant's sole right to said fund or so much thereof as will repay this defendant.

Wherefore, this defendant Guy S. Martin prays that each and all of the claims or proofs of debt filed by the several claimants herein pursuant to said order of the 24th day of January, 1934, excepting only the certain claim and proof of debt filed herein by this defendant, be stricken from the files herein, disallowed and for naught held, and that payment thereof out of the fund in the Registry of this Court be refused, that such fund, or such portion thereof as has been assigned to this defendant and shall be sufficient to satisfy and pay the claim and indebtedness owing to this defendant, be ordered repaid and refunded to him, and this defendant prays for such other and further relief and for such other and further orders of this Court as shall be just and proper.

CARTER & JONES,
RICHARD S. BULL,
Solicitors for Defendant Guy S. Martin.

Receipt of copy hereof acknowledged this 3rd day of April, 1934.

FORDYCE, WHITE, MAYNE & WILLIAMS,
Attorneys for Plaintiff, National Surety Company.

ALFRED J. STROBANS,
Attorney for Defendant, A. Clement Tobin.

61 Findings of Fact.

(Filed Nov. 26, 1934.)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

National Surety Company, a Corporation, Plaintiff,
No. 10,270. vs.
Albert Clement Tobin, et al., Defendants.

On May 2nd, 1933, final decree was entered herein upon the pleadings, prior to which on April 27th, 1933, findings of fact were filed on the issues raised by the pleadings. Thereafter on the 24th day of January, 1934, an order was entered herein allowing all parties having claims against the fund ordered paid into the Registry of this Court by the final decree herein, to file verified claims on or before March 24th, 1934, and granting and allowing all parties until the third day of April, 1934, in which to file objections or exceptions to any such claims filed.

Pursuant to the order for the filing of claims, there were filed herein seventy-seven (77) claims, seventy-two (72) of such claims having been filed on account of labor and material claimed to have been furnished to the Carlinville Post Office job, one of said claims was filed by Barton N. Grant for attorney's fees, one of said claims was filed by Guy S. Martin one of the defendants herein for moneys advanced to defendant Tobin, one of said claims having been filed by the National Surety Company for the premium on the bond in question in this suit, and two of said claims having been filed by creditors of A. Clement Tobin (one being the Western Union Telegraph Company for telegraphic messages and the other that of Buxton & Skinner Stationery Company for stationery furnished to A. Clement Tobin), neither of which come within the category of claims for labor and mate-
62 rial furnished to the Carlinville Post Office job.

After the filing of said claims certain parties filed exceptions to various and sundry claims and this matter came on for hearing before the Court on October 18th, 1934, for determination of the claims so filed and the exceptions thereto.

I.

All of the exceptions (except the exceptions of defendant Guy S. Martin) to the following claims were withdrawn. Defendant Martin did not withdraw his exceptions to such claims but his counsel stated in open court that while he did not consent to the allowance of such claims, no objection was

being made by him to the respective amounts of said claims or that the items of such claims were furnished to and for the construction of the Carlinville Post Office building, but that defendant Martin was insisting that the money heretofore paid into the Registry of the Court by the defendant Martin pursuant to the orders of this Court were improperly ordered paid into Court and that said defendant Martin was entitled to have such fund returned to him. The Court finds that the exceptions of defendant Guy S. Martin should be overruled.

The Court further finds that the following named claimants furnished labor and/or material to the Carlinville Post Office job under contract with defendant A. Clement Tobin or his sub-contractors as set forth in their respective verified claims heretofore filed herein and the Court finds that said claimants are entitled to have their respective claims allowed in the sums set opposite their names, to-wit:

	James Beveridge	$1500.00
	C. H. Roth	43.50
	Homer C. Burke, Trustee in Bank. of Gandy & Earp	24.00
	H. H. Sandman	479.04
	Emil Jubelt and W. R. Jubelt	775.00
	A. A. Ladd	300.00
	Mississippi Lime & Material Co.	307.86
	Alton Brick Company	2058.21
	Axtell Kramer	88.31
63	Bi-Wax Corporation	19.32
	A. T. Modglin	557.41
	Burt Mfg. Co.	32.10
	Philip Carey Co.	185.99
	Egyptian Supply Co.	18.13
	Ludowici-Celadon Co.	151.80
	Brass & Copper Sales Co.	404.73
	U. S. Gypsum Co.	144.40
	Carlinville Tile Co.	34.90
	Chamberlin Metal Weatherstrip Co.	82.00
	Crane Co.	45.00
	Columbia Quarry Co.	96.28
	H. D. Condie, Receiver of Condie Bray Glass Co.	14.42
	Edward Endiger Co.	233.40
	H. A. Framberg	280.00
	Hunkins-Willis Lime & Cement Co.	227.93
	Illinois Steel Bridge Co.	776.00
	H. E. Kennedy	391.11

Carl A. Koerner, doing business as Koerner Engineering Co.	925.87
Master Builders Co.	37.50
The McClelland Co.	1892.86
McGrath Sand & Gravel Co.	77.77
Mesker Bros. Iron Co.	85.00
Fred S. Morse	76.75
St. Louis Asphalt Co.	206.78
Schwab Safe Co.	251.70
Walter C. Schwartz	40.00
Max Sher	4.56
F. M. Tilley	16.50
Wiles Chipman Lbr. Co.	178.25
Winkle Terra Cotta Co.	1038.52
U. S. Gypsum Co.	409.29
Usona Mfg. Co.	37.50
Peter Vredenburgh Lbr. Co.	491.67
Illinois Power & Light Co.	8.85
George Edw. Day Sons Co., Inc.	500.31
Otto G. Braun	150.00
Straub Bros.	275.00
Walter G. Malham	132.30
Larry Schaff	208.71
Galloway-Von Gruenigen Co.	2200.80
Wenzil Andris	833.71
Jack Hyde	113.75
Robert E. Lancaster, assignee of Lancaster & Howald	345.54
H. A. Kribs, Inc.	28.11
Schwartz Material Co.	64.88
Martin Welte	11.05

II.

The Court finds that the following named parties have withdrawn their claims:

Aycock Corporation,
Buxton & Skinner Stationery Co.,
Grinnell Company,
Walter R. Mayne.

III.

Upon a hearing thereof the Court finds that the claims of the following named parties should be disallowed for
64 the reasons indicated:

National Surety Company,
for the reason that the Receiver of the National Surety Company by letter waived such claim;

Western Union Telegraph Co.
for the reason that such claim is not for labor or material furnished to the Carlinville Post Office job;

Ideal Floor Company,
for the reason that such claimant heretofore furnished to Edw. Tobin, Jr., a receipt in full of such claim, and it is admitted in such claim that pursuant to such receipt a payment of $70.12 was made to Edward Tobin, Jr., which diminished the fund in Court to that extent, and through the connivance of this claimant such payment was made to Edward Tobin, Jr.;

E. C. Scheidt,
for the reason that no proof was offered that the material set forth in such claim was used in the Carlinville Post Office job;

Edward Tobin, Sr., for the reason that the Court finds that such claimant has been paid in full for all work performed by him, and that such claim was collusively filed;

Barton N. Grant,
for the reason that this claim is for attorneys' fees against the Italian Marble Co., and the determination of this claim is not proper in this action;

IV.

The Court finds that the claim of Walter M. Winslow should be allowed herein in the sum of $608.10 and that the claims of George Edward Day Sons Co., in the sum of $66.10 and that the claim of Pittsburgh Plate Glass Company in the sum of $44.15, and of Tamms Silica Company in the sum of $33.57 should be allowed to be paid preferentially in full out of any dividend or dividends to be paid said Walter M. Winslow.

V.

The Court finds that the claim of Cope & Fisher, Assignees of Gandy & Earp should be allowed herein in the sum of $808.00, and that any dividend or dividends payable to said Cope and Fisher should be subjected to the payment in full of the claim of Central Architectural Iron Works in the sum of $60.00.

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VI.

The Court finds, upon a hearing herein, that the following claims should be allowed in the sums set opposite the names of such claimants:

C. F. Rabbeitt, Inc.,	$36.00
Shapleigh Hardware Co.,	725.40
Metzler Auto Repair Co.,	13.00
Italian Marble Company	3062.50
Ibbetson & Murphy Lumber Co.	150.04,

this latter claim having been reduced from the amount of $599.48 for which the same was filed, because the evidence disclosed that such claimant attached certain cement which had been previously sold to defendant Tobin by it, and therefor such cement could not have entered the construction of the Carlinville Post Office building, and the same having been repossessed by claimant, a credit for the purchase price thereof must be given, and further that items to the extent of $112.20 were not used in the construction of such building.

VII.

As to the claim filed herein by Guy S. Martin in the sum of $10,405.65, the Court finds that said claim is not chargeable against the fund in the Registry of this Court and that said Guy S. Martin is not entitled to a refund of any amount heretofore ordered deposited in the Registry of the Court for the following reasons:

A. The evidence discloses that Guy S. Martin was a partner of A. Clement Tobin in connection with the Carlinville Post Office job and being a partner would be liable with defendant Tobin for the payment of claims for labor and material furnished to that building and any rights that he had or might have in and to any proceeds of that particular job would be subjected to the superior rights of the parties who furnished labor and material to that building:

B. At the time of the execution of the power of attorney to defendant Martin, the defendant Tobin was insolvent and Martin having been connected with the project from its inception, having written the bond as agent of the plaintiff National Surety Company and having furnished money to Tobin to carry on the job, occupied the position of having notice and knowledge of the situation confronting Tobin at that time, a notice and knowledge which neither the Surety Company nor the creditors of Tobin could have, and while so occupying a more or less confidential position and relationship with Tobin he accepted a power of attorney to collect the entire balance due on the Carlinville Post Office job which at that time amounted to more than $16,000.00 while the utmost debt that was or could be due Martin on both the Carlinville

and Havana jobs, according to Martin's testimony and admissions in depositions, was approximately $10,000.00.

66 C. The collection by Guy S. Martin of the sum of $10,448.10 was in fraud of the rights of the creditors having claims against the Carlinville Post Office job, and the execution of the power-of-attorney by A. Clement Tobin to Guy S. Martin in December, 1932, for the collection of any and all funds that still might be due the defendant Tobin from the Government on account of said Carlinville Post Office job constituted a fraud upon the surety on Tobin's bond and a fraud upon the material men and laborers who furnished labor and material to said construction project.

D. That the right of Guy S. Martin to recover anything under his claim herein is subject to the superior right of the claimants who furnished labor and material on the job in question and if, after the payment of the claims of such laboring and material men, a balance remained on hand, there might be some reason for awarding such balance to Guy S. Martin, but since the institution of this suit, the Court finds that the National Surety Company the surety on the bond in question in this suit became insolvent, that a receiver was heretofore appointed for the National Surety Company, that the greatest total fund that can possibly come into this Court for distribution to claimants will amount to less than $15,000.00 after the payment of the costs herein and that there have been filed and allowed against such fund claims aggregating $25,324.34 and therefore a situation wherein some balance might remain after the payment of claims, to which defendant Martin might be entitled, does not exist and cannot arise in this case.

E. That Guy S. Martin does not come into equity with clean hands. The claim of Guy S. Martin which is verified by his oath sets forth that all of the items of said account aggregating $10,405.65 "were furnished to and for, and the materials and labor paid for actually entered into construction of, the postoffice building at Carlinville, Illinois"; whereas the undisputed proof shows (Exceptor's Exhibit 4, being a deposition of Guy S. Martin in the case of Maryland Casualty Company vs. Guy S. Martin and A. Clement Tobin) that on March 31, 1934, 7 days after the filing of his verified claim herein, he testified in another action that of the amount claimed in his claim in this suit, the sum of $5672.00 covered amounts of money advanced for and which were actually expended on a Post Office building at Havana, Illinois, being constructed by defendant, A. Clement Tobin, and that the

amount was so included in said claim because "I (Martin) wanted to see them paid".

F. That the defendant Guy S. Martin did not furnish any material or labor to the Carlinville Post Office building, but simply loaned moneys which were claimed to have been used in the payment of bills for work and material used in that job. Martin, therefore, occupies the position of having advanced money to his partnership enterprise which were partially used in the payment of bills on that job, and cannot be heard here to assert a prior claim to the proceeds of such job to the claims of parties who furnished labor and material therefor.

67 V.

The Court finds that the amount in the Registry of the Court and the proceeds of any further collection to be made from the United States Government on account of the contract of A. Clement Tobin with the United States Government for the erection of the Post Office building at Carlinville, Illinois, should be available to the payment of all of the allowed claims herein of claimants who furnished labor and material to the Carlinville Post Office building and that such fund should be available to such claimants pro rata without priority to one claim over the other, except as hereinbefore specifically set out.

CHARLES B. DAVIS, J.

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68 (Order Adjudicating Claims; Decree, November 26, 1934.)

(Filed November 26, 1934.)

The Court having heretofore on January 24th, 1934, entered an order herein for the filing of claims against the fund in the registry of this Court, and for filing exceptions to such claims, and various and sundry persons having filed claims against such fund, and exceptions having been filed to certain claims, and the parties hereto having stipulated as to certain claims, and the other claims and the exceptions thereto having been heretofore on October 18th, 1934 heard by the Court, and the Court being now fully advised of and concerning the same, doth now order, adjudge and decree, as follows:

1. That by consent of the parties the claim of Aycock Corporation in the sum of $288.50, Grinnel Company in the sum

of $400.08, and Buxton and Skinner Stationery Company in the sum of $19.30, be and the same are hereby disallowed;

2. That the exceptions filed herein in the claims of

Western Union Telegraph Company	in the sum of	$16.94	
Ideal Floor Company	in the sum of	37.00	
E. C. Scheidt	in the sum of	21.78,	and
Edward Tobin, Sr.,	in the sum of	1144.00,	

be and the same are hereby sustained and the said claims are hereby disallowed.

3. That by consent of the parties hereto (except Guy S. Martin), as evidenced by their stipulation filed herein, all exceptions filed herein to the following claims (except
69 the exceptions of Guy S. Martin) having been withdrawn, and it having been agreed by the parties that such claims may be allowed by the Court in the sums set opposite the names of such claimants, it is therefore ordered, adjudged and decreed that the exceptions of Guy S. Martin to the following claims be and the same are hereby overruled and such claims be and they are hereby allowed as general claims against the fund in the Registry of this Court in this case, to-wit:

James Beveridge,	$1500.00
C. H. Roth,	43.50
Homer C. Burke, Trustee in Bankruptcy of Gandy and Earp,	24.00
H. H. Sandman,	479.04
Emil Jubelt and W. R. Jubelt,	775.00
A. H. Ladd,	360.00
Mississippi Lime and Material Co.,	307.86
Alton Brick Company	2058.21
Axtell Kramer,	88.31
Bi-Wax Corporation,	19.32
A. T. Modglin,	557.41
Burt Mfg. Co.	32.10
Philip Carey Company	185.99
Egyptian Supply Company,	18.13
Ludowici-Celadon Co.,	151.80
Brass & Copper Sales Co.	404.73
U. S. Gypsum Company,	151.43
Carlinville Tile Co.	34.90
Chamberlin Metal Weatherstrip Co.,	82.00
Crane Company,	45.00
Columbia Quarry Company	96.28

H. D. Condie, Receiver of Condie Bray Glass Co.,	14.42
Edward Endiger Co.,	233.40
H. A. Framberg,	280.00
Hunkins-Willis Lime and Cement Co.,	227.93
Illinois Steel Bridge Co.,	776.00
H. E. Kennedy	391.11
Carl A. Koerner, doing business as Koerner Engineering Co.,	925.77
Master Builders Co.,	37.50
The McClelland Co.,	1892.86
McGrath Sand & Gravel Co.,	77.77
Mesker Bros. Iron Co.	85.00
Fred S. Morse,	76.75
St. Louis Asphalt Co.,	206.78
Schwab Safe Co.,	251.70
Walter C. Schwartz,	40.00
Max Sher,	4.56
F. M. Tilley,	16.50
Wiles Chipman Lumber Co.,	178.25
Winkle Terra Cotta Co.,	1038.52
U. S. Gypsum Co.,	409.29
Usona Mfg. Co.,	37.50
Peter Vredenburgh Lumber Co.,	491.67
Illinois Power and Light Co.,	8.85
Geo. Edw. Day Sons Co. Inc.,	500.31
70 Otto G. Braun,	150.00
Straub Bros.	275.00
Walter G. Malham,	132.30
Larry Schaff,	208.71
Galloway-Von Gruenigen Co.	2200.80
Weinzil Andris	833.71
Jack Hyde,	113.75
Robert E. Lancaster, Assignee of Lancaster and Howald,	345.54
H. A. Kribs, Inc.,	28.11
Schwartz Material Co.,	64.88
Martin Welte,	11.05

4. That in accordance with two separate stipulations heretofore filed herein the claims of George Edward Day Sons Co., in the sum of $66.10, of Pittsburgh Plate Glass Company in the sum of $44.15 and of Tamms Silica Company in the sum of $33.57 are hereby consolidated with the claim of Walter M. Winslow, and said claims of George Edward Day Sons Co., Pittsburgh Plate Glass Company and Tamms Silica Company, are disallowed as general claims against the fund in the registry of this Court; That the claim

of Walter M. Winslow in the sum of $608.10 be and the same is hereby allowed as a general claim against the fund in the Registry of this Court, and that any sum or sums due to said Walter M. Winslow as a general claimant herein be and the same is hereby impressed with a lien in favor of said George Edward Day Sons Co., in the sum of $66.10. Pittsburgh Plate Glass Company in the sum of $44.15, and Tamms Silica Company in the sum of $33.57, to the end that said last mentioned claims shall be paid in full out of any dividend payable to Walter M. Winslow before any payment is made to said Winslow. In the event any dividend due Walter M. Winslow herein is insufficient to pay said claims in full, said parties who are hereby decreed liens on the dividends so due said Winslow on his general claim, are to share such dividend or dividends prorata.

5. That the claim of Cope & Fisher, Assignees of Gandy and Earp in the sum of $808.00 be and the same is hereby allowed as a general claim against the fund in the Registry of this Court; that the claim of Central Architectural
71 Iron Works filed herein be and the same is hereby decreed to be a lien upon and against any sum or sums payable to Cope & Fisher, Assignees of Gandy & Earp, (to the extent of $60.00, to the end that said claim of Central Architectural Iron Works in the sum of $60.00 be paid in full out of any dividend or dividends payable to Cope & Fisher, Assignees of Gandy & Earp,) before any payment is made to said Cope & Fisher, Assignees as aforesaid on their said claim. In the event any dividend due and payable to Cope & Fisher, Assignees of Gandy & Earp, is insufficient to pay the claim of Central Architectural Iron Works in the sum of $60.00 in full, such dividends are to be payable to the said Central Architectural Iron Works to the exclusion of said Cope & Fisher Assignees of Gandy & Earp.

6. That the exceptions heretofore filed to the claim of National Surety Company in the sum of $742.25, be and the same are hereby sustained, and the said claim of the National Surety Company in the sum of $742.25 be and the same is hereby disallowed.

7. That the exceptions heretofore filed to the claim of Metzler Bros. Auto Repair Co., be sustained in part and overruled in part, and that the claim of said Metzler Bros. Auto Repair Co., be and the same is hereby allowed as a general claim against the fund in the Registry of this Court in the sum of $13.00.

8. That the exceptions heretofore filed to the claim of C. F. Rabbeitt Inc., be and the same are hereby overruled and

the claim of said C. F. Rabbeitt, Inc., in the sum of $36.00 is hereby allowed as a general claim against the fund in the Registry of this Court:

9. That the exceptions heretofore filed to the claim of Shapleigh Hardware Company be and the same are hereby overruled, and the claim of said Shapleigh Hardware Company in the sum of $725.40 is hereby allowed as a general claim against the fund in the Registry of this Court;

72 10. That the exceptions heretofore filed to the claim of Ibbetson & Murphy Lumber Company, be sustained in part and overruled in part, and that the claim of Ibbetson & Murphy Lumber Company be and the same is hereby allowed as a general claim against the fund in the Registry of this Court in the sum of $150.04;

11. That upon oral application of Walter R. Mayne, attorney for the plaintiff herein, the claim of said Walter R. Mayne for compensation as attorney for plaintiff be and the same is hereby dismissed.

12. That the oral application of counsel for plaintiff to have the costs of court taxed against the fund in the Registry of the Court and to have refunded to him all deposits for costs heretofore made herein, be and the same is hereby sustained and the Clerk of this Court is hereby ordered and directed to pay to Walter R. Mayne, attorney for the plaintiff out of the fund in the Registry of this Court such sum or sums as plaintiff has heretofore deposited for security for costs herein;

13. That the exceptions heretofore filed to the claim of Barton N. Grant in the sum of $300.00, be and the same are hereby sustained and said claim of Barton N. Grant be and the same is hereby disallowed;

14. That the exceptions heretofore filed to the claim of Italian Marble Company in the sum of $3062.50, be and the same are hereby overruled, and the claim of said Italian Marble Company in the sum of $3062.50 be and the same is hereby allowed as a general claim against the fund in the Registry of this Court;

15. That the fees of Floyd A. Buchanan for reporting the proceedings had in the trial and hearing of the claims herein be and the same are hereby ordered taxed as costs herein, to be paid out of the fund in the Registry of the Court;

73 16. That the exceptions to the claim of Guy S. Martin in the sum of $10405.65, be and the same are hereby sustained and the claim of said Guy S. Martin be and the same is hereby disallowed;

17. That the application of Alfred J. Strobans for compensation as attorney for defendant herein in the sum of $750.00 for services claimed to have been rendered herein in preserving the fund in the Registry of the Court, be and the same is hereby disallowed;

18. That the oral application for payment of the sum of $35.00 to Schissler Kessler & Co., Certified Public Accountants for accounting services claimed to have been performed for the benefit of the creditors herein, be and the same is hereby sustained and the said claim of Schissler Kessler & Co., in the sum of $35.00 be and the same is hereby ordered paid by the clerk out of the fund in the Registry of the Court;

19. It is further Ordered, Adjudged and Decreed that all claims allowed herein as general claims against the fund in the Registry of the Court in this case, be and the same are hereby decreed to be on a parity and without preference to one claim over another, and that all sums now in the Registry of this Court in accordance with the orders heretofore entered by this Court, shall be and the same are hereby ordered disbursed by the Clerk of this Court to all general claimants whose claims are herein allowed, prorata, after the payment of all costs herein and the reservation of a fund of approximately $500.00 to cover any future costs and expenses herein.

20. The Court reserves the right and jurisdiction herein to make such other and further orders and decrees herein with respect to the collection of the balance due from the United States Government to A. Clement Tobin under his contract for the construction of the Carlinville Post Office Building, and for final distribution of any fund now in Court or hereafter to be deposited herein or collected by the receiver heretofore appointed, as to the Court may seem proper.

St. Louis, Missouri,
November 26, 1934.

CHARLES B. DAVIS,
Judge.

74 Record Entry of Filing of Petition for Appeal and Assignment of Errors.

(February 23, 1935.)

Now comes defendant Guy S. Martin by his attorney and files and presents to the Court herein his petition for allowance of appeal to the U. S. Circuit Court of Appeals from decree entered November 26, 1934, together with assignment of errors on such proposed appeal.

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75 Petition of Defendant Guy S. Martin for Appeal.

(Filed February 23, 1935.)

The defendant Guy S. Martin, conceiving himself aggrieved by the order, decree and judgment heretofore rendered herein by this court on the 26th day of November, 1934, comes now by the undersigned, his solicitors, and petitions this honorable court for an order allowing said defendant to appeal from said order, decree and judgment to the United States Circuit Court of Appeals for the Eighth Circuit, under and according to the laws of the United States in that behalf made and provided, and for the reasons specified in the assignment of errors which is filed herewith, and said defendant prays that a citation be issued directed to the above named plaintiff, National Surety Company, a corporation, to the above named defendant A. Clement Tobin, and to the several claimants or creditors herein, commanding them and each of them to appear before the United States Circuit Court of Appeals for the Eighth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records, proceedings and papers upon which said order, decree and judgment was made and rendered, duly authenticated, may be sent by the Clerk of this court to the United States Circuit Court of Appeals for the Eighth Circuit.

Your petitioner Guy S. Martin further prays that an order be made in said cause by this court fixing the amount of security which said defendant shall give and furnish upon said appeal, and by whom said security shall be approved,
76 and that upon giving such security and the approval of same, all further proceedings as to the matters contained and referred to in said order, decree and judgment be suspended and stayed until the determination of this appeal.

Your petitioner Guy S. Martin further prays that he be granted and allowed until the 23rd day of March, 1935 within which time he may file his praecipe and his narrative state-

ment of the evidence herein, and that the September term 1934 of this court be extended and continued with respect to this cause to and including the 23rd day of March, 1935, for the purpose of allowing this petitioner time for making and filing the necessary praecipe and all necessary statements of the evidence, motions, orders and other proceedings to perfect an appeal of the above entitled cause.

GUY S. MARTIN,
By Richard S. Bull, His Solicitor.

CARTER & JONES,
Of Counsel.

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77 Assignment of Errors.

(Filed February 23, 1935.)

Comes now defendant Guy S. Martin, by his counsel, and, having petitioned for the allowance of an appeal from the order and decree of this court made and entered on the 26th day of November, 1934, files and presents this his assignments of error herein, upon which he will rely upon his said appeal. The errors so asserted and relied upon are as follows:

I.

The Court erred in overruling the exceptions of said defendant Guy S. Martin to the claims filed in said cause, and listed and itemized or referred to in Paragraphs numbered 3, 4, 5, 7, 8, 9, 10 and 14 of said order, and in failing and refusing to sustain such exceptions to such claims.

II.

The Court erred in allowing the claims listed and itemized or referred to in Paragraphs numbered 3, 4, 5, 7, 8, 9, 10 and 14 of said order against the fund in the registry of the court in said case and against the objections and exceptions of defendant Guy S. Martin.

III.

The Court erred in taxing against the fund in the registry of the court and in ordering payment therefrom, of the costs of court, of fees for reporting the proceedings had in the trial and hearing of the claim filed in said cause, and of fee for accounting services claimed to have been performed for the benefit of the creditors in said cause, all as ordered and decreed in Paragraphs numbered 12, 15 and 18, respec-

78 tively, of said order.

IV.

The Court erred in sustaining the exceptions to the claim of defendant Guy S. Martin as decreed in Paragraph 16 of said order, and in failing and refusing to overrule said exceptions.

V.

The Court erred in disallowing the claim of said defendant Guy S. Martin as decreed in Paragraph numbered 16 of said order, and in failing and refusing to allow such claim.

VI.

The Court erred in decreeing that all sums now in the registry of the court in accordance with the orders theretofore entered by the court, should be disbursed by the Clerk of said court to all general claimants whose claims were by said decree and order allowed, pro rata, as decreed in Paragraph 19 of said order.

VII.

The Court erred in failing and refusing to order and decree, as prayed by defendant Guy S. Martin, that each and all of the claims or proofs of debt filed by the several claimants in said cause pursuant to the order of the Court of the 24th day of January, 1934, excepting only the certain claim and proof of debt filed therein by said defendant, be stricken from the files, disallowed and for naught held, and that payment thereof out of the fund in the registry of the Court be refused.

VIII.

The Court erred in failing and refusing to order and decree as prayed for by said defendant Guy S. Martin, that the fund theretofore deposited in the registry of the Court, or such portion thereof as had been assigned to said defendant and as should be sufficient to satisfy and pay the claim and indebtedness owing to said defendant from defendant A. Clement Tobin, be repaid and refunded to said defendant Guy S. Martin.

IX.

The Court erred in finding and concluding, as is recited in Paragraph 7 of its "Findings of Fact" that the claim filed in said cause by said defendant Guy S. Martin, in the sum
79 of $10,405.65, was not chargeable against the fund in the registry of the Court, and in finding and concluding that said defendant was not entitled to a refund of any amount from the fund theretofore ordered deposited in the registry of the Court.

X.

The Court erred in finding and concluding, as recited in Paragraph 7 (A) of its "Findings of Fact" that the defendant Guy S. Martin was a partner of A. Clement Tobin, and that any rights said defendant Martin had or might have in and to any proceeds from the Carlinville Post Office job would be subjected to the superior rights of the parties who furnished labor and material to that building.

XI.

The Court erred in finding and concluding, as recited in Paragraph 7 (B) of its "Findings of Fact" that defendant Guy S. Martin occupied the position of having notice and knowledge of the fact that defendant Tobin was insolvent at the time of the execution of the power of attorney to defendant Martin.

XII.

The Court erred in finding and concluding, as recited in Paragraph 7 (C) of its "Findings of Fact" that the collection by defendant Guy S. Martin of the sum of $10,448.10 was in fraud of the rights of the creditors having claims against the Carlinville Post Office job and that the execution of the power of attorney to said defendant constituted a fraud upon the surety on defendant Tobin's bond and a fraud upon the materialmen and laborers who furnished material and labor to said construction project.

XIII.

The Court erred in finding and concluding, as recited in Paragraph 7 (D) of its "Findings of Fact" that the right of defendant Guy S. Martin to recover anything under his claim in said cause is subjected to the superior right of the claimants who furnished labor and material on the aforesaid job.

XIV.

The Court erred in finding and concluding, as recited in Paragraph 7 (E) of its "Findings of Fact", that de-
80 fendant Guy S. Martin does or did not come into equity with clean hands.

XV.

The Court erred in finding and concluding, as recited in Paragraph 7 (F) of its "Findings of Fact", that while defendant Guy S. Martin loaned moneys which had been used in the payment of bills for work and material used in the construction of the Post Office building in Carlinville, Illinois,

yet said defendant could not be heard to assert a prior claim to the proceeds of such job to the claims of parties who furnished labor and material therefor.

XVI.

The Court erred in its order dated January 24, 1934 in ordering that all parties claiming any right, title or interest in and to the fund in the registry of the court be required or permitted to file verified claims for consideration against said fund.

XVII.

The Court erred in its conclusions of law entered and filed in said cause on the 27th day of April, 1933, after having found as a fact that defendant Tobin was indebted to defendant Guy S. Martin in a sum in excess of $10,000.00 for money loaned, in concluding that plaintiff National Surety Company was entitled to have available all sums of money due from the government to defendant Tobin in December, 1932, and subsequent thereto, including the sum of $10,448.10 collected by said Martin, pending the adjustment and payment of the labor and material bills, as recited in Paragraph No. 6 of said Conclusions of Law.

XVIII.

The Court erred in its conclusions of law entered and filed in said cause on the 27th day of April, 1933, in concluding that it was necessarily an implied provision of the contract between the government and defendant Tobin that in due course said defendant Tobin would pay for all labor and materials required for the construction of the Carlinville Post Office Building.

XIX.

The Court erred in its conclusions of law entered and
81 filed in said cause on the 27th day of April, 1933 in concluding that defendant Tobin was in default and had breached the contract at the time he gave defendant Martin a power of attorney to collect money from the government in December, 1932, and that this condition prevailed at the time defendant Martin collected the sum of $10,448.10 from the government on February 6, 1933.

Wherefore, and in order that the foregoing Assignment of Errors may be and appear of record in this cause, defendant Guy S. Martin presents the same to this Court and prays that such disposition may be made thereof as in accordance with the law and the statutes of the United States in such cases made and provided; and said defendant further prays

that said decree may be reversed and that a decree be entered in accordance with the rights of said defendant.

RICHARD S. BULL,
Solicitor and Counsel for Defendant Guy S. Martin (Appellant)

CARTER & JONES, Of Counsel.

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82 Order Allowing Appeal.

(Filed February 23, 1935.)

The petition of Guy S. Martin, defendant herein, praying for an appeal from the order, decree and judgment of this court heretofore entered herein on the 26th day of November, 1934, in the above entitled cause, allowing certain claims of claimants and creditors to the fund deposited in court herein, decreeing that all sums now in the registry of this court in accordance with the orders hereinbefore entered by this court shall be disbursed to all general claimants whose claims were allowed therein, pro rata, sustaining exceptions to the claim of Guy S. Martin, Defendant, and disallowing said claim of said defendant Guy S. Martin, and overruling the exceptions of said defendant Guy S. Martin to the claims therein allowed, being now presented, and on petition and motion of said defendant Guy S. Martin for orders fixing the amount of bond on appeal, extending the time and the September term 1934 for the purpose of allowing said defendant (appellant) to prepare and have allowed and filed his praecipe and all necessary statements of the evidence, motions, orders and other proceedings to perfect an appeal of the above entitled cause, it is hereby Ordered as follows:

1. That an appeal be allowed said defendant by Guy S. Martin to the United States Circuit Court of Appeals for the Eighth Circuit as prayed for, and that a transcript of such part of the record and proceedings herein as the parties may by a praecipe duly designate, be transmitted, duly authenticated, to the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri, in the manner
83 provided by law.

2. That a citation be issued admonishing the plaintiff National Surety Company, a corporation, the defendant A. Clement Tobin, and the several claimants and creditors who were allowed claims against the fund deposited in this (Appellees) to be and appear before the United States Circuit Court of Appeals for the Eighth Circuit within forty days from February 23, 1935.

3. That within ten days from the entry of this order bond, with good and sufficient surety, be given by defendant Guy S. Martin on said appeal, and that such bond be and the same is hereby fixed at the sum of $2500.00, and conditioned as required by law, and that thereupon said appeal shall operate as a supersedeas of the order decreeing judgment made and entered on the 26th of November, 1934, and shall suspend and stay all further proceedings in this cause, so far as the said order, decree and judgment are concerned, until the termination of said appeal by the United States Circuit Court of Appeals for the Eighth Circuit.

4. That the September term 1934 of this court is hereby extended and continued with respect to this cause, and said defendant petitioner Guy S. Martin is hereby allowed and granted to and including the 23 day of April, 1935, for the purpose of allowing said defendant time for making and filing his praecipe and all necessary statements of the evidence, bonds on appeal, motions, orders and other proceedings to perfect an appeal of the above entitled cause.

Done and Ordered in open court at St. Louis, Missouri, this 23 day of February, 1935.

CHARLES B. DAVIS,
District Judge, Division No. 2.

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84 Order Approving Appeal Bond.

(Entered March 5th, 1935.)

Now comes the defendant Guy S. Martin, and presents to the Court his bond on appeal in the sum of $2500.00, which bond is approved and filed.

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85 Appeal Bond.

(Filed Mar. 5, 1935.)

Know All Men By These Presents:

That we, Guy S. Martin, Appellant, as Principal, and Massachusetts Bonding and Insurance Company, as Surety, are held and firmly bound unto National Surety Company, a corporation, James Beveridge, C. H. Roth, Homer C. Burke, Trustee in Bankruptcy of Gandy and Earp, H. H. Sandman, Emil Jubelt and W. R. Jubelt, A. H. Ladd, Mississippi Lime and Material Co., Alton Brick Company, Axtell Kramer, Bi-Wax Corporation, A. T. Modglin, Burt Mfg. Co., Philip Carey Company, Egyptian Supply Company, Ludiwici-Celadon Co.,

Brass & Copper Sales Co., U. S. Gypsum Company, Carlinville Tile Co., Chamberlin Metal Weatherstrip Co., Crane Company, Columbia Quarry Company, H. D. Condie, Receiver of Condie-Bray Glass Co., Edward Endiger Co., H. A. Framberg, Hunkins-Willis Lime and Cement Co., Illinois Steel Bridge Co., H. E. Kennedy, Carl A. Koerner, doing business as Koerner Engineering Co., Master Builders Co., The McClelland Co., McGrath Sand & Gravel Co., Mesker Bros. Iron Co., Fred S. Morse, St. Louis Asphalt Co., Schwab Safe Co., Walter C. Schwartz, Max Sher, F. M. Tilley, Wiles Chipman Lumber Co., Winkle Terra Cotta Co., U. S. Gypsum Co., Usona Mfg. Co., Peter Vredenburgh Lumber Co., Illinois Power and Light Co., Geo. Edw. Day Sons Co., Inc., Otto G. Braun, Straub Bros., Walter G. Melham, Larry Schaff, Galloway-Von Grueningen Co., Wenzil Andris, Jack Hyde, Robert F. Lancaster, Assignee of Lancaster and Howard, H. A. Kribs, Inc., Schwartz Material Co., Martin Welte, Walter M. Winslow, George Edward Day Sons Co., Pittsburgh Plate Glass Company, Tamms Silica Company, Cope & Fisher, Assignee of Gandy and Earp, Central Architectural Iron Works, Metzler Bros. Auto Repair Company, C. F. Rabbeitt, Inc., Shapleigh Hardware Company, Ibbetson & Murphy Lumber Company, and Italian Marble Company, Appellees, in the full and just sum of Two Thousand Five Hundred ($2500.00) Dollars, to be paid to said Appellees, their heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of March in the year of our Lord one thousand nine hundred and thirty-five.

86 Whereas, lately at the September term A. D. 1934 of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in said Court between National Surety Company, a corporation, Plaintiff, and A. Clement Tobin and Guy S. Martin, Defendants, judgment was rendered against the said Guy S. Martin, and the said Guy S. Martin has obtained an appeal of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said appellees (hereinabove named) citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, forty (40) days from and after the date of said citation.

Now The Condition Of The Above Obligation Is Such, that if the said Guy S. Martin, Appellant, shall prosecute said ap-

peal to effect, and answer all damages and costs if he fail to make good his appeal, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of:

GUY S. MARTIN, Principal.

MASSACHUSETTS BONDING AND INSURANCE COMPANY, Surety. (Seal)
By A. Gorden Decker, Atty. in fact.

Approved by:
Charles B. Davis.

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87 (Order, April 3, 1935, Extending Time to File Transcript, etc.)

(Filed April 3, 1935.)

Upon application of defendant Guy S. Martin (appellant) and for good cause shown, it is Ordered that the time allowed said defendant (appellant) for filing the transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit, be and the same is hereby extended to and including the 1st day of June, 1935.

It Is Further Ordered that the time for filing the praecipe, the narrative of evidence and other documents to perfect the appeal of said defendant Guy S. Martin in this court be, and the same is hereby extended to and including the 1st day of June, 1935.

CHARLES B. DAVIS,
United States District Judge.

Dated April 3rd, 1935.

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88 (Order, May 29, 1935, Further Extending Time to File Transcript, etc.)

(Received, Filed and Entered May 29, 1935.)

Upon application of defendant Guy S. Martin (appellant) and for good cause shown, it is Ordered that the time allowed said defendant (appellant) for filing the transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit, be and the same is hereby extended to and including the 1 day of July, 1935.

It Is Further Ordered that the time for filing the praecipe, the narrative of evidence and other documents to perfect the appeal of said defendant Guy S. Martin in this court be, and the same is hereby extended to and including the 20th day of June, 1935.

CHARLES B. DAVIS,
United States District Judge.

Dated 5-28-1935.

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89 (Order, June 15, 1935, Further Extending Time to File Transcript, etc.)

(Filed June 15, 1935.)

Upon application of defendant Guy S. Martin (appellant) and for good cause shown, it is Ordered that the time allowed said defendant (appellant) for filing the transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit, be and the same is hereby extended to and including the 1st day of August, 1935.

It Is Further Ordered that the time for filing the praecipe, the narrative of evidence and other documents to perfect the appeal of said defendant Guy S. Martin in this court be, and the same is hereby extended to and including the 20th day of July, 1935.

CHARLES B. DAVIS,
United States District Judge.

Dated June 15th, 1935.

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90 (Order, July 5, 1935, Further Extending Time to File Transcript, etc.)

(Filed July 5th, 1935.)

Upon application of defendant Guy S. Martin (appellant) and for good cause shown, it is Ordered that the time allowed said defendant (appellant) for filing the transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit, be and the same is hereby extended to and including the 1st day of October, 1935.

It Is Further Ordered that the time for filing the praecipe, the narrative of evidence and other documents to perfect the appeal of said defendant Guy S. Martin in this court be, and the same is hereby extended to and including the 20th day of September, 1935.

CHARLES B. DAVIS,
United States District Judge.

Dated July 5th, 1935.

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91 (Order, September 14, 1935, Further Extending Time to File Transcript, etc.)

(Filed September 14, 1935.)

Upon application of defendant Guy S. Martin (appellant) and for good cause shown, it is Ordered that the time allowed said defendant (appellant) for filing the transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit, be and the same is hereby extended to and including the 11th day of November, 1935.

It Is Further Ordered that the time for filing the praecipe, the narrative of evidence and other documents to perfect the appeal of said defendant Guy S. Martin in this court be, and the same is hereby extended to and including the 28th day of October, 1935.

CHARLES B. DAVIS,
United States District Judge.

Dated September 14th, 1935.

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92 (Order, October 28, 1935, Further Extending Time to File Transcript, etc.)

(Filed October 28, 1935.)

Upon application of defendant Guy S. Martin (appellant) and for good cause shown, it is Ordered that the time allowed said defendant (appellant) for filing the transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit, be and the same is hereby extended to and including the 30th day of November, 1935.

It Is Further Ordered that the time for filing the praecipe, the narrative of evidence and other documents to perfect the appeal of said defendant Guy S. Martin in this court be, and the same is hereby extended to and including the 16th day of November, 1935.

CHARLES B. DAVIS,
United States District Judge.

Dated October 28th, 1935.

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93 (Order, November 16, 1935, Further Extending Time to File Transcript, etc.)

(Filed November 16, 1935.)

Upon oral application of certain of the claimants (appellees) herein, and for good cause shown, it is Ordered that

the time allowed defendant Guy S. Martin (appellant) for filing the narrative of evidence and other documents to perfect the appeal of said defendant in this court be, and the same is hereby extended to and including the 30th day of November, 1935.

It is further Ordered that the time allowed said defendant (appellant) for filing the transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit, be and the same is hereby extended to and including the 14th day of December, 1935.

CHARLES B. DAVIS,
United States District Judge.

Dated November 16, 1935.

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94 Motion of Defendant (Appellant) Guy S. Martin For Appointment of Trustee For Certain Appellees For Purpose of Service.

(Filed June 11, 1935.)

Comes now Guy S. Martin, one of the defendants herein, and respectfully states and shows to this Honorable Court that on the 23rd day of February, 1935, he was, by order duly entered herein, allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit and the citation of this Court was duly issued directed to the several parties named as appellees therein, to the number of sixty-six; that thereafter said defendant (appellant) obtained service of said citation upon all of said appellees or their counsel with the exception of eight, all of which number are unrepresented by counsel of record herein and are residents of various places outside the territory comprised by this judicial district and outside the State of Missouri, the names and addresses of whom, as shown by the papers on file herein, are as follows:

Schwab Safe Co., Lafayette, Ind.,
Carlinville Tile Co., 141 Hoehn St., Carlinville, Ill.,
Max Sher, 710 Fourteenth St., N. W., Washington, D. C.,
F. M. Tilley, 2141 South 12th St., Springfield, Ill.,
Walter M. Winslow, 826 W. Carroll St., Macomb, Ill.,
Metzler Bros. Auto Repair Co., Carlinville, Ill.
Ibbetson & Murphy Lumber Co., Carlinville, Ill.,
Illinois Power & Light Co.

Said defendant (appellant) Guy S. Martin further states and shows that of the other fifty-eight parties thus named as appellees herein and upon whom or whose counsel service

of said citation was obtained, the following, whose names and addresses are as shown in the papers on file herein, are outside the territory comprised by this judicial district and outside the State of Missouri, and in addition are not represented by counsel herein upon whom service may be obtained within this judicial district or within the State
95 of Missouri:

Homer C. Burke, Trustee in Bankruptcy of Gandy and Earp, Decatur, Ill., (Counsel—Redmon, Redmon & Bodman, Decatur, Ill.)

Emil Jublet and W. R. Jublet, Gillespie, Ill., (Counsel—Alvin G. Whitehouse, Gillespie, Ill.)

A. H. Ladd, Edwardsville, Ill. (Counsel—Alvin G. Whitehouse, Gillespie, Ill.)

Burt Mfg. Co., Akron, Ohio (not represented by counsel)

Cope & Fisher, assignee of Gandy and Earp (Counsel—Monroe & Allen, Decatur, Ill.)

Said defendant appellant Guy S. Martin further states and shows that by reason of the facts and circumstances aforesaid he has been unable to obtain service of the said citation upon the parties first named above, and cannot obtain such service without great inconvenience and expense, and that, as to all of the parties named above, including those who are represented by counsel located elsewhere than in this judicial district, he will be unable to obtain service upon them of the documents, papers and records which he is required to file in this Court and in the Circuit Court of Appeals for the Eighth Circuit in order to perfect and complete his appeal, without great and unreasonable inconvenience, expense and delay, and he further states and shows that the perfection and completion of said appeal may be greatly expedited and convenienced without injustice to any interested party herein, by the designation and appointment by this Court of a Trustee for all of said parties appellee hereinbefore named, to the end that such Trustee may be served with or may give his acknowledgment of service on behalf of said parties appellee of all the papers, documents and records which still remain to be served thereupon and to be filed in order to complete and perfect the appeal herein.

Wherefore, this defendant (appellant) prays the Court to designate and appoint a Trustee for the parties appellee herein named and to authorize and direct said Trustee to receive notice and accept service of all papers, documents,

records and proceedings on behalf of said parties, which may be required to be served or filed in order to complete and perfect the appeal allowed herein to the said Circuit Court of Appeals.

RICHARD S. BULL,
Counsel For Defendant (Appellant) Guy S. Martin.

CARTER & JONES,
Of Counsel.

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96 (Order Appointing Trustee for Purpose of Receiving Service for Certain Appellees.)

(Filed June 11, 1935.)

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

National Surety Company, a corporation, Plaintiff,
No. 10,270. vs. Div. #2.
A. Clement Tobin, et al., Defendants.

The Court having heretofore on the 23rd day of February, 1935, allowed defendant Guy S. Martin an appeal to the Circuit Court of Appeals for the Eighth Circuit, and having issued its citation directed to the several parties named as appellees therein, to the number of sixty-six, and the said defendant (appellant) having filed his Motion for Appointment of a Trustee for certain appellees who are not resident within this district and who are not represented by counsel resident within this district, for the purpose of receiving notice and accepting service of all papers, documents, records and proceedings on behalf of said certain appellees, and said motion having been duly heard and considered by the Court, and the Court being now fully advised of and concerning the same, doth now order, adjudge and decree, as follows:

1. That Otto O. Fickeissen, a duly licensed attorney at law, a resident of this District and enrolled in this Court, be and is hereby designated and appointed as Trustee herein for the following parties named as appellees in the citation issued herein on the 23rd day of February, 1935, in the appeal allowed defendant, Guy S. Martin:

Schwab Safe Co., Lafayette, Ind.,
Carlinville Tile Co., 141 Hoehn St., Carlinville, Ill.,
Max Sher, 710 Fourteenth St., N. W., Washington, D. C.,
F. M. Tilley, 2141 South 12th St., Springfield, Ill.,
Walter M. Winslow, 826 W. Carroll St., Macomb, Ill.,

Metzler Bros. Auto Repair Co., Carlinville, Ill.,
Ibbetson & Murphy Lumber Co., Carlinville, Ill.,
Illinois Power & Light Co.,
Homer C. Burke, Trustee in Bankruptcy of Gandy and Earp, Decatur, Ill., (Counsel—Redmon, Redmon & Bodman, Decatur, Ill.),
Emil Jubelt and W. R. Jubelt, Gillespie, Ill. (Counsel—Alvin G. Whitehouse, Gillespie, Ill.),
97 A. H. Ladd, Edwardsville, Ill. (Counsel—Alvin G. Whitehouse, Gillespie, Ill.),
Burt Mfg. Co., Akron, Ohio (not represented by counsel),
Cope & Fisher, assignee of Gandy & Earp (Counsel—Monroe & Allen, Decatur, Ill.).

2. That said Trustee be and is hereby authorized and directed to receive notice and accept service of all papers, documents, records and proceedings on behalf of said parties appellee which may be required to be served or filed in order to complete and perfect the aforesaid appeal.

CHARLES B. DAVIS,
United States District Judge for the Eastern District of Missouri.

Dated: June 11, 1935.

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98 (Notice of Lodgment of Narrative Statement of Evidence.)

(Filed November 4, 1935.)

To: National Surety Company, a corporation, James Beveridge, C. H. Roth, Homer C. Burke, Trustee in Bankruptcy of Gandy and Earp, H. H. Sandman, Emil Jubelt and W. R. Jubelt, A. H. Ladd, Mississippi Lime and Material Co., Alton Brick Company, Axtell Kramer, Bi-Wax Corporation, A. T. Modglin, Burt Mfg. Co., Philip Carey Company, Egyptian Supply Company, Ludiwici-Celadon Co., Brass & Copper Sales Co., U. S. Gypsum Company, Carlinville Tile Co., Chamberlin Metal Weatherstrip Co., Crane Company, Columbia Quarry Company, H. D. Condie, Receiver of Condie-Bray Glass Co., Edward Endiger Co., H. A. Framberg, Hunkins-Willis Lime and Cement Co., Illinois Steel Bridge Co., H. E. Kennedy, Carl A. Koerner, doing business as Koerner Engineering Co., Master Builders Co., The McClelland Co., McGrath Sand & Gravel Co., Mesker Bros. Iron Co., Fred S. Morse, St. Louis Asphalt Co., Schwab Safe Co., Walter C. Schwartz, Max Sher, F. M. Tilley, Wiles-Chipman Lum-

ber Co., Winkle Terra Cotta Co., Usona Mfg. Co., Peter Vredenburgh Lumber Co., Illinois Power & Light Co., Geo. Edw. Day Sons, Inc., Otto G. Braun, Straub Bros., Walter G. Malham, Larry Schaff, Galloway-Von Gruenigen Co., Wenzil Andris, Jack Hyde, Robert E. Lancaster, Assignee of Lancaster and Howard, H. A. Kribs, Inc., Schwartz Material Co., Martin Welte, Walter M. Winslow, Pittsburgh Plate Glass Company, Tamms Silica Co., Cope & Fisher, Assignee of Gandy and Earp, Central Architectural Iron Works, Metzler Bros. Auto Repair Company, C. F. Rabeitt, Inc., Shapleigh Hardware Company, Ibbetson & Murphy Lumber Company, and Italian Marble Company, or their respective attorneys:

Please Take Notice, that on the 26th day of October, 1935, the undersigned lodged with the Clerk of this Court a proposed narrative statement of evidence to be transmitted to the Circuit Court of Appeals for the Eighth Circuit in the appeal allowed in the above entitled cause to defendant Guy S. Martin, and that the undersigned will, at 10 o'clock A. M. on the 15th day of November, 1935, or as soon thereafter as counsel can be heard, appear before the Honorable Charles B. Davis, Judge, in his Court herein, and ask the Court to approve the said statement.

OLIVER F. ERBS,
RICHARD S. BULL,
Attorneys for Appellant, Guy S. Martin.

Carter & Jones,
Of Counsel.

Receipt of the above notice is hereby acknowledged this 4th day of November, 1935.

FORDYCE, WHITE, MAYNE & WILLIAMS,
Attorneys for National Surety Co.

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OTTO O. FICKEISSEN,
Attorney for James Beveridge, Mississippi Lime & Material Co., Alton Brick Co., Carl A. Koerner, Usona Mfg. Co., Wenzil Andris, Schwartz Material Co., Ludowici-Celadon Co., Crane Co., Master Builders Co., Cham-

berlin Metal Weatherstrip Co., C. H. Roth, Bi-Wax Corporation, H. D. Condie, Receiver, Martin Welte, Axtel Kramer, A. T. Modglin, Egyptian Supply Co., McGrath Sand & Gravel Co., H. A. Kribs, Inc., Tamms Silica Co., Pittsburgh Plate Glass Co., Walter C. Schwartz.

OTTO O. FICKEISSEN,
Trustee, appointed by order herein dated June 11th, 1935, for the purpose of receiving notice to and accepting service for Schwab Safe Co., Carlinville Tile Co., Max Sher, F. M. Tilley, Walter M. Winslow, Metzler Bros. Auto Repair Co., Ibbetson & Murphy Lumber Co., Illinois Power & Light Co., Homer C. Burke, Trustee in Bankruptcy of Gandy and Earp, Emil Jubelt and W. R. Jubelt, A. H. Ladd, Burt Mfg. Co., Cope & Fisher, Assignee of Gandy & Earp.

RASSIEUR, KAMMERER & RASSIEUR,
Attorneys for The McClelland Co., H. E. Kennedy, Robert E. Lancaster, Vredenburgh Lumber Co., H. H. Sandman.

BANISTER, LEONARD, SIBLEY & SUSMAN,
Attorney for Edward Endiger Co.

WINKLE TERRA COTTA CO.,
By Vincent D. Gallo.

KEIL & KEIL,
By Wm. T. Keil,
Attorney for Jack Hyde.

CULLEN, FAUNTLEROY & EDWARDS,
Attorney for United States Gypsum Co.

CURLEE & TEASDALE,
Attorneys for St. Louis Asphalt Co.

FELIX CORNITIUS,
Attorney for Shapleigh Hardware Co.

FRANK A. ZEIS,
Attorney for Otto G. Braun, Walter F. Malham, Larry Schaf, Straub Bros.

JAMES E. KING,
Attorney for C. F. Rabbeitt, Inc.

DAVID K. BREED,
Attorney for Central Architectural Iron Works.

J. H. CUNNINGHAM, JR.,
Attorney for Galloway-Von Grueningen Co.

100 E. H. SCHWARZENBACH,
Attorney for George Edward Day Sons Co., Inc.

SAM M. DEGEN,
By Harold J. Abrams,
Attorney for H. A. Framberg, Mesker Bros. Iron Co.

HERBERT F. HAHN,
Attorney for Philip Carey Co.

GREENSFELDER & GRAND,
Attorneys for Hunkins-Willis Lime & Cement Co.

IGOE, CARROLL, HIGGS & KEEFE,
Attorneys for Illinois Steel Bridge Co.

OLIVER BLACKINTON,
Attorney for Brass & Copper Sales Co.

M. P. PHILLIPS,
By R. S. B.,
Attorney for Fred S. Morse.

ITALIAN MARBLE COMPANY,
By Cullen, Fauntleroy & Edwards.

COLUMBIA QUARRY COMPANY,
By H. . Schmitt, Sec'y-Treas.

WILES-CHIPMAN LUMBER COMPANY,
By R. C. C osby, Secretary.

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101 Election as to Printing and Praecipe for Transcript.

Filed November 4th, 1935.

Guy S. Martin, appellant herein, by his solicitors, elects to waive the printing of the record under the provisions of the Acts of Congress, and to file a typewritten transcript of said record in the United States Circuit Court of Appeals for the Eighth Circuit, and also elects that said transcript of the record be printed under the supervision of the Clerk of the said Circuit Court of Appeals.

In preparing the transcript of the record in this appeal, the Clerk of this court is requested to include therein the following:

1. Citation, showing acknowledgments of service and date filed.

2. Record entry of filing of original bill of complaint on February 9, 1933.

3. Record entry of order to show cause issued on February 9, 1933.

4. Record entry of filing of joint and separate return of defendants A. Clement Tobin and Guy S. Martin to order to show cause, filed February 20, 1933.

5. Amended bill of complaint filed by plaintiff on February 18, 1933, omitting Exhibits A, B and C attached thereto, which are included in the summary of evidence.

6. Order sustaining application for temporary injunction filed and entered February 23, 1933.

7. Joint and separate amended answer of defendants A. Clement Tobin and Guy S. Martin filed March 27, 1933.

8. Findings of fact and conclusions of law entered and filed April 27, 1933.

9. Decree and order entered and filed May 2, 1933.

10. Record entry of withdrawal of Carter, Jones &
102 Turney, Richard S. Bull and Oliver F. Erbs, as attorneys for defendant A. Clement Tobin entered June 5, 1933.

11. Petition of plaintiff for order fixing time for filing claims, filed January 23, 1934.

12. Order for filing claims, filed and entered January 24, 1934.

13. Exceptions, and in the event they are overruled, proof of claim of Guy S. Martin, filed March 24, 1934.

14. Exceptions of Alton Brick Co. to proof of claim of Guy S. Martin filed March 5th, 1934, omitting other exceptions to said proof of claim with statement that said other exceptions are omitted because of their similarity to the said exceptions of Alton Brick Co.

15. Objections and exceptions of defendant Guy S. Martin to claims filed herein and to allowance thereof, filed April 2, 1934.

16. Findings of fact and conclusions of law filed and entered November 26, 1934.

17. Decree adjudicating claims, filed and entered November 26, 1934.

18. Petition of defendant Guy S. Martin for appeal filed February 23, 1935, assignment of errors, order allowing appeal, appeal bond filed March 5, 1935, order approving appeal bond, all in the instant appeal.

19. Order of April 3, 1935 extending time for filing transcript and narrative of evidence.

20. Order of May 29, 1935, extending time for filing transcript and narrative of evidence.

21. Order of June 15, 1935 extending time for filing transcript and narrative of evidence.

22. Order of July 5, 1935 extending time for filing transcript and narrative of evidence.

23. Order of September 14, 1935 extending time for filing transcript and narrative of evidence.

24. Order of October 28, 1935 extending time for filing transcript and narrative of evidence.

25. Motion of defendant Guy S. Martin for appointment of trustee for the purpose of receiving service on behalf of certain appellees filed June 11, 1935.

26. Order of June 11, 1935 appointing trustee for purpose of receiving service for certain appellees.

27. This praecipe and election as to printing, showing acknowledgments of service thereof.

28. Notice of filing narrative statement, showing acknowledgments of service thereof.

29. Narrative statement or summary of the evidence lodged with the Clerk of this Court on October 26, 1935, together with order of the court approving such statement of evidence and record entry of the filing thereof.

103 30. Clerk's certificate.

OLIVER F. ERBS,
RICHARD S. BULL,
Solicitors for Defendant Guy S. Martin (Appellant).

Carter & Jones,
Of Counsel.

Service of the foregoing election as to printing and praecipe for transcript acknowledged this 4th day of November, 1935.

FORDYCE, WHITE, MAYNE & WILLIAMS,
Attorneys for National Surety Co.

OTTO O. FICKEISSEN,
Attorney for James Beveridge, Mississippi Lime and Material Co., Alton Brick Co., Carl A. Koerner, Usona Mfg. Co., Wenzil Andris, Schwartz Material Co., Ludowici-Celadon Co., Crane Co., Master Builders Co., Chamberlin Metal Weatherstrip Co., C. H. Roth, Bi-Wax Corporation, H. D. Condie, Receiver, Martin Welte, Axtel Kramer, A. T. Modglin, Egyptian Supply Co., McGrath Sand & Gravel Co., H. A. Kribs, Inc., Tamms Silica Co., Pittsburgh Plate Co., Walter C. Schwartz.

OTTO O. FICKEISSEN,
Trustee, appointed by order herein dated June 11th, 1935, for the purpose of receiving notice to and accepting service for Schwab Safe Co., Carlinville Tile Co., Max Sher, F. M. Tilley, Walter M. Winslow, Metzler Bros. Auto Repair Co., Ibbetson & Murphy Lumber Co., Illinois Power & Light Co., Homer C. Burke, Trustee in Bankruptcy of Gandy and Earp, Emil Jubelt and W. R. Jubelt, A. H. Ladd, Burt Mfg. Co., Cope & Fisher, Assignee of Gandy & Earp.

RASSIEUR, LAMMERER & RASSIEUR,
Attorneys for The McClelland Co., H. E. Kennedy, Robert E. Lancaster, Vredenburgh Lumber Co., H. H. Sandman.

BANISTER, LEONARD, SIBLEY & SUSMAN,
Attorneys for Edward Endiger Co.

WINKLE TERRA COTTA CO.
By Vincent D. Gallo,

KEIL & KEIL,
By Wm. Keil,
Attorney for Jack Hyde.

CULLEN, FAUNTLEROY & EDWARDS,
Attorneys for United States Gypsum Co.

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CURLEE & TEASDALE,
Attorneys for St. Louis Asphalt Co.

FELIX CORNITIUS,
Attorney for Shapleigh Hardware Co.

FRANK A. ZEIS,
Attorney for Otto G. Braun, Walter F. Malham, Larry Schaf, Straub Bros.

JAMES E. KING,
Attorney for C. F. Rabbeitt, Inc.

DAVID K. BREED,
Attorney for Central Architectural Iron Works.

J. H. CUNNINGHAM, JR.,
Attorney for Calloway-Van Grueningen Co.

E. H. SCHWARZENBACH,
Attorney for George Edward Day Sons Co., Inc.

SAM M. DEGEN,
By Harold J. Abrams,
Attorney for H. A. Framberg, Mesker Bros. Iron Co.

HERBERT F. HAHN,
Attorney for Philip Carey Co.

GREENSFELDER & GRAND,
Attorneys for Hunkins-Willis Lime & Cement Co.

IGOE, CARROLL, HIGGS & KEEFE,
Attorneys for Illinois Steel Bridge Co.

OLIVER BLACKINTON,
Attorney for Brass & Copper Sales Co.

M. P. PHILLIPS,
By R. S. B.,
Attorney for Fred S. Morse.

ITALIAN MARBLE COMPANY,
By Cullen, Fauntleroy & Edwards,

COLUMBIA QUARRY COMPANY,
By H. F. Schmitt, Sec'y-Treas.

WILES-CHIPMAN LUMBER COMPANY,
By R. C. Crosby, Secretary.

105 Narrative Statement of the Evidence.

(Lodged October 26th, 1935.)

(Filed Nov. 30th, 1935.)

Be It Remembered, that in the progress of the above entitled cause the following proceedings were had, to-wit:

On February 20, 1933, at a hearing before Honorable Charles B. Davis, District Judge, on application for a temporary injunction and for the appointment of a Receiver, etc., the following evidence was offered:

Appearances:

Messrs. Fordyce, White, Mayne and Williams, by Walter R. Mayne, Esq., for Plaintiff;

Messrs. Carter, Jones and Turney, by Richard S. Bull, Esq., for Defendants Albert Clement Tobin and Guy S. Martin.

The evidence heard at this hearing, it was agreed by counsel at the hearing on the merits would be taken as submitted as evidence at the latter hearing, on March 17, 1933, and such evidence was also offered and taken as submitted in connection with the hearing held on October 18, 1934 upon the claims of the various claimants as well as exceptions thereto.

NICHOLAS C. DROLLENGA, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Mayne:

My home is in Chicago, Illinois; I am employed as a construction engineer by the United States Government and as such I had the engineering work on the Carlinville Post Office building. I know Mr. Tobin, who was the general
106 contractor on that job. Work started on the 22nd of March, 1932. The government is now in possession of the building. The work has not been accepted in its entirety; there is still work to be done which is of small consequence. The estimate for work performed by Mr. Tobin in December, 1932, was signed by me and given to Mr. Tobin, but was not signed by him. The January estimate was handled in a little different way. It was given to the general contractor with the understanding that he was to see someone with whom he was financially affiliated, and that it was

to be returned to me, but it was not returned. The routine with reference to these estimates was that we would discuss the amounts, come to an agreement, and sometimes the contractor would sign a blank voucher. I was to send the estimates in to Washington in duplicate after the contractor signed. Those were my instructions, and that is the way estimates were sent in on this work until the December and January estimates, which I did not receive back from Mr. Tobin. He did not tell me that he had turned those estimates over to Mr. Martin; that was none of our business. The power of attorney to collect the money under the December and January estimates, given by Mr. Tobin to Mr. Martin, was never discussed with me.

The money still due from the government on this job is about $5,700.00. As far as I know the labor and material bills on this work have not all been paid; I don't know the exact amount still due on the job. The time for completion of the work fixed by contract was January 18, 1933; we received orders from Washington to accept the building on the first of February. The contract calls for a penalty of $35.00 a day for the time spent beyond 320 calendar days to complete the building. I have nothing to do with the penalty, and I don't receive any instructions to claim penalties. I make up the final report and state the conditions and they are taken into consideration in Washington.

Cross-Examination.

By Mr. Bull:

After January 18th, the date fixed by contract for completion, the work performed consisted of painting and
107 varnishing woodwork and installing wire partitions and painting them. It was impossible to occupy the building until that work was completed. And then there was an inspection made by the District Engineer and his orders were that there was to be a floor taken up and relaid before the building was to be occupied, but that didn't delay the occupancy of the building, because when all the other work had been completed, I wired in to Washington as to what their pleasure would be as to the matter of the floor, so that the contractor would not have to pay any penalty because of the fact that there was a question in his mind as to whether that floor ought to be relaid or not. The question of whether a claim for a penalty will be made, which is for consideration in Washington, won't be decided until all the work is completed and my final report is submitted.

The amount of approximately $5,700.00 still due includes 10% of the contract price retained and about $900.00 as be-

ing held back for miscellaneous items, I and the contractor having agreed to this at the time the last voucher was made out. As to the filing of a power of attorney in Washington, executed by Tobin to Martin, I was not informed thereof. The Treasury Department wouldn't feel that such information was of any benefit to me; it is not necessary for me to know that. In these contracts, if there is a power of attorney or assignment, the Treasury Department is notified of it, and it is their knowledge which really matters.

The amount of the December voucher was $3,942.00, and the one for January was for $6,506.10. Both the estimates, in the amounts mentioned, were signed by me. The usual procedure was that vouchers be returned by the contractor after he signs them to the construction engineer who forwards them to Washington along with monthly progress reports, but there is nothing remaining to be done on those estimates after they are signed. There was no particular reason why I should not sign them before the contractor; sometimes I would and other times I would not.

Redirect Examination.

By Mr. Mayne:

I sent in to Washington all previous estimates on this job. Those for December and January Mr. Tobin said he
108 would return to me, but he failed to come back and failed to let me know that he was not coming.

LON W. HARLOW, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Mayne:

I am Vice-President of the National Surety Company and have been for nearly three years. I am in charge of the St. Louis office. I know Mr. Guy S. Martin, who was a former agent of the National Surety Company, and who had power of attorney to execute bonds. The bond in this case was executed on February 12, 1932, and it was shortly after its execution that Mr. Martin's power of attorney was revoked. The first knowledge I had that this bond had been executed was from another contractor who said Mr. Tobin had told him that the National Surety Company was going to execute it. I then found that Mr. Guy Martin had some connection with Mr. Tobin, and I told Mr. Martin that from the information I had this bond should not be executed, and asked him not to execute it, but he did it. Plaintiff's Exhibit B is the usual form of application for bond with my com-

pany and is the application referred to in plaintiff's petition.

Shortly after the first of the year of 1933 I had quite a few conversations with Mr. Martin concerning the difficulties that the contractor was encountering by reason of non-payment of labor and material bills. I told Mr. Martin the company was very much concerned about bills going to the home office, and urged him to get behind Tobin and have him clean up outstanding accounts. Mr. Martin did not tell me, in the early part of January, that he had received a power of attorney from Tobin on this job, but about two weeks ago he came in and said he had collected $10,400.00 under power of attorney. He said at that time that Tobin owed him some money. I tried to ascertain the amount and he said he had not had an opportunity yet to check over his accounts and find out just how much that was. By inference I gathered the impression that it was rather a small amount comparatively. Prior to hearing about this power of attorney Mr. Martin had wanted to handle the accounts himself, saying he knew there was plenty of money in the job to pay
109 everybody, and he wanted the National Surety Company to recognize an assignment to him. He would agree under that assignment to take care of the outstanding accounts, but this was not agreeable to the National Surety Company. At the time he offered to guarantee outstanding bills there was some $16,000.00 still due on this job from the government. Since being advised that Mr. Martin had secured this $10,400.00, I have talked with him with reference to payment of these bills. I told him that he owed it to everybody concerned, including himself, to see that these outstanding bills were paid. He said he knew there was plenty of money in the job and he would agree to have himself appointed as trustee along with Mr. Hauck, our claim attorney, and see that the outstanding bills were paid. He didn't tell me that he expected to pay himself first; I didn't know that Mr. Tobin owed him anything up until just recently.

Cross-Examination.

By Mr. Bull:

When Mr. Martin first told me he had collected some $10,400.00 he came in and volunteered that information. It was also at that time that he offered to work the thing out by guaranteeing the payment of creditors' claims, in other words, that he would save the surety company if he would be allowed to work it out. His offer was to have the surety company's represen-

tative work with him on it and it was this proposal that was not accepted by the surety company. As to whether Tobin owed him a small or large amount of money he didn't tell me; he said he had not checked over his account to see just what it totalled. It was only by inference from our conversation that I gathered it was a comparatively small amount. At that time there was a total of about $11,000.00 in bills that had come in to the surety company.

ROBERT L. EDGAR, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Mayne:

I am a branch manager of National Surety Company in St. Louis. I know Mr. Guy S. Martin but am not acquainted with Mr. Tobin. I think it was the first week in Janu-
110 ary of this year that I first talked with Mr. Martin about the Carlinville Post Office Job. We were checking over with him the outstanding bills on the contract, and at that time I believe there were $8,000.00 or $9,000.00 in such bills. At that time Mr. Martin thought there was sufficient money in the contract to insure its completion, and to pay all bills. At that time he did not tell me that he received a power of attorney from Mr. Tobin, and I did not know of it. In that conversation I asked Mr. Martin if Mr. Tobin was indebted to him in any way, and he said no. I had no further conversation with Mr. Martin. I did not know that Mr. Martin had secured the December and January estimates at that time. I did not know he had secured from the government some $10,448.00.

The Court: He had not secured the money at that time, at the time he had this conversation.

Mr. Mayne: That is true.

Cross-Examination.

By Mr. Bull:

The circumstances of my discussion with Mr. Martin were that Mr. Hauck came from the Claim Department of our company and asked me to call him in, and when I did so he came in. I knew at that time that Mr. Martin had some interest in this job; he executed the bond for the National Surety Company. There is a moral obligation on the agent who executes bonds to try to work the thing out. My information that there were bills outstanding for $8,000.00 or $9,000.00 came from Mr. Hauck, who had a list of the bills.

Mr. Martin's statement was that his check of the job showed that the number of bills outstanding at that time and the amount of money coming would insure completion of the job and payment of the bills.

R. C. HAUCK, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Mayne:

I am an adjuster with the National Surety Company in St. Louis. I have met Mr. Tobin and I know Mr. Guy S. Martin. I first met Mr. Tobin in November or December, 1932, when I wrote him a letter relative to certain
111 material bills that had been presented to us. He came in and we discussed the account of the Mississippi Lime and Material Company, which was the only unpaid bill I had received. Mr. Tobin stated that a part of the material represented by that bill did not go into this contract; it was a disputed account. In response to another request as to unpaid bills he called again on December 20th at which time I requested Mr. Tobin to give joint control so that bills could be paid. I handed him the joint control blanks and he stated he would refer them to his attorney and let me hear from him the following day, but he didn't come back. He never delivered this power of attorney or joint control to me. I also discussed with Mr. Martin the matter of Tobin giving us joint control of the balance in the contract, but he said that he would not recommend it, giving as his reason that the surety company would get the $16,000.00 in their possession and pay out certain labor and material bills, and it would be two or three years before they would turn the balance of it back. At that time he did not tell me that Mr. Tobin owed him any money.

I have here a list of bills that have been sent in to the National Surety Company that remain unpaid, and they total $15,536.31 from about twenty creditors. The largest item is $3,132.00. Mr. Martin did not tell me that he had a power of attorney from Tobin, or that he was going to Washington to get this $10,400.00. I found he had secured it on February 8th after his trip to Washington, in a conversation in Mr. Harlow's office. He told me at that time that Mr. Tobin was indebted to him, but he did not say how much. He said he had been to Washington and got $10,000.00 and that there was a balance due from the government of $6,800.00; that he would apply sufficient out of this $10,000.00 added to what the government still retained, to pay the outstanding

material bills. At that conversation he did not say he expected to pay himself out of this money. In a telephone conversation immediately preceding February 8th he tried to get me to commit myself, that is, that he had the $10,000.00 and he said "Don't you think it is all right for me to retain what is due me?" He did not tell me how much he claimed to be due. I recall the conference in your office on February 15th when you were preparing the restraining order in this case, and I recall Mr. Martin being asked
112 how much money was due him from Mr. Tobin and that Mr. Martin stated he did not know. I also recall Mr. Tobin stating that he did not know whether he owed Mr. Martin any money. Neither Martin nor Tobin indicated that Tobin was indebted to Martin in the sum of some $8,600.00.

Cross-Examination.

By Mr. Bull:

The first notice we received of any unpaid claim was the one from Mississippi Lime and Material Company, which was in October, 1932. This contract had been carried out for some several months, and there were no other unpaid claims that I know of at that time. So far as I knew Tobin was going along and paying his way as he went. It was on December 20th that I first requested that a joint control agreement be entered into. The blank I gave Tobin was a regular government form; I am not entirely familiar with its terms. I don't know whether it gave practically absolute control to the surety company; it gives us power of attorney to endorse checks. I do recall as a fact that either Tobin or Martin told me after they had seen this blank, that they wouldn't enter into that agreement because of the fact that it gave absolute or too far-reaching authority to the surety company. Mr. Martin in December did offer to enter into an agreement, a power of attorney executed to a representative of the National Surety Company and himself jointly. That offer was not taken up by me or by my company. I don't recall if that offer was renewed later on by Mr. Martin, but I am acquainted with the circumstances related by Mr. Harlow of the offer being renewed in February. It was then during this discussion with Martin that he said "Don't you think it is all right to retain what is due me?" It was after the discussion in Mr. Harlow's office that he let me know in a telephone conversation that Tobin owed him money. In the discussion in Mr. Mayne's office, when we were attempting to work out a consent order of some kind, there was mention during the morning when we were meeting there of the fact that there was an indebtedness from Tobin to Martin. I was not present in the afternoon at the later

meeting, and I don't know whether the exact or approximate figures were brought in at that time. Other than the original application and indemnity agreement our company at no time has had any assignment or power of attorney to receive the money due. In that it is provided that there will be executed a power of attorney or assignment in the event of a default. So far as I know the Treasury Department has never been notified by me or by my company that there was any default in the payment of creditor's claims by Tobin, and no copy of that application and bond have ever been filed with the Treasury Department, to my knowledge.

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Redirect Examination.

By Mr. Mayne:

I did have conversations with the government engineer on the job concerning the unpaid bills on this job. I notified him on several occasions that I had received bills for labor and material which were unpaid, and he told me that people had come to him stating that their bills had not been paid. Plaintiff's Exhibit "D" is the form of power of attorney that I requested Mr. Tobin to execute and which was never returned to me. The joint control we desired was National Surety Company joint control with Mr. Tobin, over the funds, so that the bills would be paid. Under such joint control the surety company would sign the checks and they would also be signed by Mr. Tobin.

Recross Examination.

By Mr. Bull:

This document or form marked Plaintiff's Exhibit "D" is the paper I refer to as the joint control agreement. I didn't examine it to determine if it was actually a power of attorney (After examining paper): It is an outright power of attorney, proposed to be executed to the National Surety Company.

O. F. UNDERWOOD, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Mayne:

I live in St. Louis and am an adjuster in the Claim Department of the National Surety Company. I know Mr. Tobin and Mr. Martin. On December 20, (1932) Mr. Hauck and I had a conversation with Mr. Martin in the claim office. Mr. Hauck was discussing the question of National Surety Company having joint control over the balance

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of payments to be made on these estimates. Mr. Martin would not agree to joint control, but he said he would take control with Mr. Hauck. He didn't have Mr. Tobin in the picture at all. I asked Mr. Martin if it was not a fact that he had loaned Mr. Tobin some money to put in on this job, and he said yes he had loaned him some money, but it had been repaid.

Cross-Examination.

By Mr. Bull:

When we discussed this joint control I did not see or inspect the blank or form, but I knew that one was mailed to our office from the New York office. As to whether this was a joint control agreement, or a mere power of attorney granting full authority to the surety company to receive all the money, I would not say I got an impression either way. I knew what he wanted to do was to get authority to endorse checks that were made payable to Mr. Tobin, and it was to have the checks made payable to National Surety Company and Mr. Tobin, and to come through the National, but they couldn't be cashed unless Mr. Tobin also endorsed them. The money then was to go to the material men by checks drawn payable on this account in which this check would be deposited. The deposit would be in the name of the National Surety Company and Tobin, and checks drawn payable to the material men by the National and Mr. Tobin. I don't believe I ever looked at the proposed form that they asked Mr. Tobin or Mr. Martin to execute; I don't know that it was power of attorney to the National Surety Company to receive the money itself.

WALTER R. MAYNE, a witness of lawful age, being produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Testimony.

My name is Walter R. Mayne; I am attorney for National Surety Company in this proceeding. On February 4, 1933, Mr. Tobin and Mr. Erbs, his attorney, came to my office and stated that they desired to work out a joint control of the balance of the funds due from the government, for the payment of labor and material bills. I asked them whether they had secured the power of attorney which they had
115 delivered to Mr. Martin. Mr. Erbs stated that he would secure it the following Monday and deliver it to me, and requested that I prepare in the meantime a joint control agreement. I asked Mr. Tobin and also Mr. Erbs whether the power of attorney had been delivered to the Treasury Department. Mr. Erbs did not seem to know

whether it had been or not, but Mr. Tobin said it was still in Mr. Martin's possession. At that time Mr. Tobin told me he had not any outstanding obligation to Mr. Martin. At that time I did not know, nor was I informed by Mr. Tobin, that Mr. Martin had already received or was about to receive the $10,400.00 from the government.

After this conversation, and on the following Wednesday, Mr. Martin telephoned me and informed me that he had received $10,400.00 from the government, and that he was willing to work out a satisfactory arrangement, but he would not turn over the funds for joint control. Mr. Martin never indicated to me at that conversation that Mr. Tobin was in any way indebted to him. He showed an interest toward seeing that the material bills were paid, but he offered no suggestion as to how they would be paid.

Cross-Examination.

By Mr. Bull:

It was on February 4th that I asked Mr. Tobin if he owed Mr. Martin money. Mr. Erbs was present the entire time that this conversation went on, but Mr. Martin was not then present. Mr. Martin was in Washington or on his way there and getting the money at that time. I didn't know from whom Mr. Erbs was to obtain the power of attorney; I assumed it was in Mr. Martin's possession. I think it was mentioned that it was in his possession, that is, that it had been executed and delivered to him, but I did not know it had been filed in the Treasury Department in December, 1932. I didn't know that until I received your return this morning. Neither Mr. Erbs nor Mr. Tobin led me to believe that either one of them had possession of the power of attorney, but they indicated that they could acquire it very easily.

Mr. Mayne then offered in evidence Plaintiff's Exhibit "A", the contract, Plaintiff's Exhibit "B", the application for bond, and Plaintiff's Exhibit "C", the bond, all referred to in the petition, and Plaintiff's Exhibit "D", a form of power of attorney.

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116 Plaintiff's Exhibit A.

The contract introduced in evidence marked Plaintiff's Exhibit "A" was on the standard government form of construction contract. It was dated February 12, 1932, and was signed for the United States of America by an Assistant Secretary of the Treasury, and the contractor was named therein as Albert Clement Tobin, an individual, trading as A.

Clement Tobin & Company, and provided that the contractor should furnish all labor and materials and perform all work required for the construction, including approaches, of the Post Office building at Carlinville, Illinois, for the consideration of Forty-nine Thousand Five Hundred ($49,500.00) Dollars. The only other provisions of the contract which might be deemed of any materiality to the issues herein are those contained in Article 16, which reads as follows:

"Article 16. Payments to contractors.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

117 Plaintiff's Exhibit B.

The application for contract bond introduced in evidence and marked Plaintiff's Exhibit B was on the printed form of the National Surety Company and addressed to such company, and was signed by Albert Clement Tobin, as applicant. After reciting the applicant's desire that the company execute a bond in the sum of Twenty-five Thousand ($25,000.00) Dollars in favor of the United States Government, the principal object thereof being to guarantee the performance of a certain contract as thereinafter described, that the applicant guaranteed the truth of all answers to the interrogatories contained therein and of the truth and accuracy of the applicant's financial statement filed concurrently with the application, that the amount of the contract was Forty-nine Thousand Five Hundred ($49,500.00) Dollars, that the applicant's estimate of the cost of work was Thirty-seven Thousand Six Hundred Seventy-three ($37,673.00) Dollars, that all of the work would be sublet and that the subcontractors would furnish surety bonds (Interrogatory 14), that the applicant then had an uncompleted contract for the United States Post Office at Havana, Illinois (Interrogatory 24), that the applicant had not assigned and would not assign his payment on this contract or any part thereof (Interrogatory 31) and after other recitals deemed of no materiality to the issues here, this application contained a number of covenants, of which the following are the only ones which might be deemed of any materiality to the issues herein:

"3rd. That the undersigned will at all times indemnify and keep indemnified, the Company, and hold and save it harmless from and against any and all liability, damages, loss, costs, charges and expenses of whatever kind or nature, including counsel and attorney's fees, which the Company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the Company of any and all other bonds executed, for us at our instance and request, and that we will pay over, reimburse and make good to the Company, its successors and assigns all sums and amounts of money which the Company or its representatives shall pay, or cause to be paid, or become liable to pay on account of the execution of any such instrument, and on account of any liability, damages, costs, charges and expenses of whatsoever kind or nature, as well, also, in connection with any litigation, investigation, collecting any premium due or losses sustained or other matters connected therewith, including counsel and

attorney's fees, such payment to be made to the Company as soon as it shall have become liable therefor, whether the Company shall have paid said sum or any part thereof or not.

That in any accounting which may be had between the
118 undersigned and the Company, the Company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether such liability, necessity, or expediency existed or not.

4th. That in the event of the failure of the undersigned to comply with or make due performance of any covenant hereof, the Company may at any time thereafter take such steps as it may deem necessary or proper to obtain its release from all liability, under any and every such bond, and to secure and further indemnify itself against loss and all damage and expense which the Company may sustain or incur, or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by the undersigned.

5th. That for the better protection and security of the Company, the undersigned, as of the date hereof, hereby assigns, transfers and conveys to the Company, all the right, title and interest of the undersigned in and to all the supplies, tools, plant, equipment and materials of every nature and description that he or it may now or hereafter have upon said work, or in, or on, about the site thereof, and also all materials purchased for or chargeable to the said contract which may be in process of manufacture or construction, or in transportation, or in storage elsewhere, and also all his or its rights in and to all subcontracts relating to said work which have been or may hereafter be made, together with the materials embraced therein, and as well all the rights, title and interests of the undersigned in and to all bonds executed to the undersigned securing the performance by said subcontractors of such subcontracts, hereby subrogating said Company to all such rights, title and interests of the undersigned therein; and the undersigned does hereby authorize and empower the Company, its authorized agents or attorneys, to enter upon and take possession of said supplies, tools, plant, equipment, materials and subcontracts, and enforce, use and enjoy the title thereto and the possession thereof in the event of any default on the part of the undersigned in the performance of the contract hereinabove referred to or in the payment of the premiums above mentioned.

6th. That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the Company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said bond.

7th. That in the event the Company is required to reserve from its assets an amount to cover any contingent claim or claims under the bond herein applied for, by reason of default of the undersigned, abandonment of contract, liens filed, dispute with the owner or obligee, or for any other reason whatsoever, the undersigned hereby covenants and agrees to immediately on demand deposit with the Company, in current funds, an amount sufficient to cover any such contingent claim or claims, as a trust fund or collateral security, to be held by the Company as indemnity on the bond herein applied for, in addition to the indemnity afforded by this instrument; and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including counsel or attorney's fees, which it may thereby incur, shall be included in such action and paid by the undersigned."

119 This application was dated at Havana, Illinois, on February 19, 1932.

Plaintiff's Exhibit C.

The bond introduced in evidence and marked Plaintiff's Exhibit C was on the standard government form of performance bond and was as follows:

"Know All Men By These Presents, That we, Albert Clement Tobin, an individual trading as A. Clement Tobin & Company, of Richmond Heights, Missouri, as Principal, and National Surety Company as Surety, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of Twenty-five Thousand dollars lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, execu-

tors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition Of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated February 12th, 1932, for the construction, including approaches, of the Post Office at Carlinville, Illinois:

Now, Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 18th day of February, 1932, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

A. CLEMENT TOBIN (Seal)
o/B as A. Clement Tobin & Co.
(Seal)

In presence of:
Karl Kierker,
Havana, Illinois.

A. CLEMENT TOBIN,
7235 Elmore Ave.,
Richmond Heights, Mo.

NATIONAL SURETY COMPANY,
New York City, New York,
By Guy S. Martin,
Attorney-in-fact.

Attest:
Janet Bremer
Jane Bremer.

120 The rate of premium on this bond is 15.00 per thousand.

Total amount of premium charged, $742.50"

Plaintiff's Exhibit D.

The form of power of attorney introduced in evidence marked Plaintiff's Exhibit "D" was a printed form of the United States Treasury Department, and omitting the caption and the form of acknowledgment, it read as follows:

"Know All Men By These Presents:

That the undersigned ....., of ....., does hereby appoint ....., of ....., as attorney to receive, indorse, and collect checks in the name of the undersigned, drawn on the Treasurer of the United States, for whatever account, ..., and to give full discharge for same, granting to said attorney full power of substitution and revocation, hereby ratifying and confirming all that said attorney, or his substitute, shall lawfully do or cause to be done by virtue hereof.

Witness the signature and seal of the undersigned, this .... day of ....., 19 ..

..... (Seal)"

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121 Defendants' Case.

And thereupon the defendants, to sustain the issues on their behalf, offered the following evidence:

GUY S. MARTIN, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendants as follows:

Direct Examination.

By Mr. Bull:

I am in the insurance business, my office being at 104 North Fourth Street. About a year ago I was a broker with authority from the National Surety Company to execute bonds and I executed the bond on this Carlinville job. I had known Mr. Tobin some five, six or seven years prior to that. I had written some insurance for him at various times, and in addition I had loaned him some money on another job, for the Post Office Building in Havana, Illinois. My dealings with him on the Havana job were that I loaned him money at various times to carry on his work. By reference to my books it appears that the first loan was on October 15, 1931

when I made an advance of $600.00. My account started before that, carrying some insurance indebtedness, and, starting with October, 1931, the account on the Havana job has continued ever since. These books are my office records and regular books of entry. I did not make the entries myself, they were made by the young lady who works for me. I would give her the charges when I got my checks back, and my account with Tobin was posted up every thirty days. Beginning in March of 1932 the charges made against Tobin on my books indicated, for that month, two items. One is earned premium on compensation insurance, $36.11, and on public liability for $356.00. The items for April of 1932 are for one check dated April 2nd, $300.00, and one dated April 8th for $200.00. Defendants' Exhibits "A" and "B" are those checks. Those checks were issued for Mr. Tobin for use on the Carlinville Post Office. The circumstance of my paying that money to Tobin was that he came to me and asked for a loan, or called me on the telephone, and I then wrote these checks.

122 The witness was then shown a package of checks the first of which was dated May 5, 1932, check No. 3451, and the last of which was dated January 26, 1933, and numbered 3790, and containing fifty-one (51) checks, in addition to those already marked "Defendants' Exhibits A and B." The package was offered in evidence as one exhibit being marked Defendants' Exhibit C. Those of them not signed by Mr. Martin but drawn on the Tower Grove Bank and signed by A. Clement Tobin & Company, by A. Clement Tobin, were objected to when offered in evidence, but the objection was overruled when Mr. Bull stated that it would be shown that in fact they were drawn by Tobin on Martin's account, under authority issued to the bank by Mr. Martin.

Defendant Martin's Exhibits A, B and C.

Defendant Martin's Exhibits A, B and C, then introduced in evidence, consisted respectively of a check dated April 2, 1932 for $300.00, a check dated April 8, 1932 for $200.00 and a package of 51 checks, the first of which was dated May 5, 1932, No. 3451, and the last of which was dated January 26, 1933, or 53 checks in all, all cancelled, of which some were signed by Guy S. Martin and some by A. Clement Tobin and Company, by A. Clement Tobin. Said checks are not set out or copied herein for the reason that the same are reflected in the items appearing in Defendant Martin's Exhibits N and O, hereinafter set out, and are deemed sufficiently identified and explained in the testimony herein set forth.

The witness then referred to the checks marked Defendant's Exhibits A and B, and to the package of checks marked Defendants' Exhibit C, which were separated into two stacks, and stated:

These checks which were signed by Mr. Tobin were paid on some bills which I guaranteed and Mr. Tobin wanted to pay them under his own name. I knew of my own knowledge that they were paid out of my account, and that that was so as to all of the checks I have here signed by Tobin. These fifty-one (51) checks, including those signed by Mr. Tobin, are reflected in my account book; there should be items corresponding to the amounts of the checks appearing in my ledger sheets.

Looking at the account for November, 1932, there is an item charged on November 2nd of $3.06 on a strike riot policy, and on the 15th there was a deposit premium
123 on public liability policy of $12.00 and also on compensation policy of $200.00. On the 5th is a check for $300.00 and an arbitrary charge for interest of $1,000.00, representing interest on the money I advanced to Mr. Tobin on various occasions. In the last few days I made a calculation of the actual interest charge on the average balance, and it should be $409.77 at 6%, in place of that entry of $1,000.00. My books will bear readjustment to that extent. This check shown me dated November 5th for $300.00 is entered in the $1,300.00 charge. The check, shown me, dated November 9th, for $350.00, appears on my ledger for November 29th where I have a charge of $1,350.00, the additional $1,000.00 there being a charge for a bill which had been presented to me by the Huttig Company which I had guaranteed for Mr. Tobin. The same situation obtains as to another entry on the 16th for $1,575.00 which represents a check for $75.00 and an account charged on the same date of the Illinois Steel Bridge Company, for $1,500.00, the items not being segregated on my books. On December 10th, there was a check for $300.00 and a charge on account of a bill from Peoria Stone and Granite Company of $1,000.00, which likewise appear in a single item. Summarizing, it appears that in those two months there were additional charges entered against Tobin totalling $3,500.00 which in my record are unsegregated from the check items, and these additional charges represented bills assumed by me. I became liable to the Maryland Casualty Company for those bills, and so I charged them to Tobin. With the exceptions noted—those three or four entries—my books otherwise reflect item by item these checks which I have identified here; I think they do, I haven't checked the book with the checks.

Running the account down through the year 1932 it appears that on January 6th Tobin owed me $8,267.53.

The witness then referred to ledger sheets taken from his book and to a total of 31 of the 53 checks previously identified, which 31 checks bore the signature of Mr. Tobin, and stated: These checks were covered by a written authorization I gave the Tower Grove Bank to pay them and charge them to my account. Defendant Martin's Exhibits "D", "E" and "F" were then identified as carbon copies
124 of three letters sent by the witness to the Tower Grove Bank, bearing dates of June 30, 1932, June 28, 1932 and June 24, 1932, and were offered in evidence.

Defendant Martin's Exhibits D, E and F.

Said exhibits in their entirety are not deemed to be of materiality to the issues herein presented and for that reason, and for the reason that the same are not now available after diligent search, are not here set out in full, but as shown by the testimony in reference thereto such exhibits consisted of carbon copies of three letters sent by the witness Guy S. Martin to the Tower Grove Bank authorizing said bank to pay the certain checks referred to and signed by Mr. Tobin out of the account in said bank of said Guy S. Martin.

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125 In December of 1932 I had in my possession an executed power of attorney from Tobin which I filed by mailing it to the Treasury Department. Defendant Martin's Exhibit "G" is a carbon copy of a letter to the Treasury Department dated December 28th in which I enclosed the appointment as attorney for A. Clement Tobin. Defendant Martin's Exhibit "H" is a carbon copy of a letter dated December 21st addressed to the Treasurer of the United States asking him to forward all checks made payable to A. Clement Tobin to Guy S. Martin, which letter was signed by A. Clement Tobin. These two exhibits represent accurate copies of the originals which were sent. Tobin's debit balance to me on December 28, 1932 would have been $8,267.53; there wasn't any entry between December 28th and January 6th. I believe it was on Monday, February 6th, that I obtained the check from the government; I left St. Louis the previous Saturday night. The amount of that check was ten thousand four hundred odd dollars. It has not yet been posted in my ledger sheets. The receipt of that check not being reflected in the account, Tobin's debit balance with me on February 9th was $9,610.82, such balance including the arbitrary or tentative charge for interest of $1,000.00. I have

since computed the actual interest charge on the average balance at 6% and it amounts to $409.77, and Tobin's debit balance would be subject to that readjustment.

I am acquainted with Mr. Robert Edgar, who testified this morning, but I do not recall any meeting or discussion with him with reference to the Carlinville job, and I don't recall having had any conversation with Mr. Edgar and Mr. Harlow with reference to paying off claims on that job. I did discuss the matter several times with Mr. Hauck in December and January, and I talked with him concerning the execution of some joint control agreement. Mr. Hauck wanted these funds turned over to the National Surety Company and I told him that Mr. Tobin would not want to do that. We discussed the possibility of arriving at some arrangement whereby somebody could represent the surety company and somebody could represent Mr. Tobin. Mr. Hauck did not have any objection in particular, but he did tell me
126 later that the company would not agree to an actual joint control. I saw the blank form which was submitted to me or Tobin and I think it was just a power of attorney to collect the funds. I told Mr. Hauck that there was an indebtedness from Tobin to me, but I don't recall when it was I first told him.

Cross-Examination.

By Mr. Mayne:

I am forty-seven years old. I was connected with the National Surety Company about a year and a half and had been in the insurance business prior to that time. I knew Mr. Tobin for six or seven years. I did not know, prior to February, 1932, that Mr. Tobin had had any difficulties particularly with his job at Havana, Illinois. I did know that he had not paid all his labor and material bills on that job. I am not sure I knew that before February, 1932. I knew he had considerable money coming from the Havana job. I had a power of attorney from the government on that job, and collected money on it. On June 22 (1932) I collected $7,704.00 and on November 14th I collected $5,258.00 on the Havana job. It is a fact that money I paid out for Mr. Tobin was on the Havana Post Office job; that money was paid out of these two payments that I received on the Havana job. As to all this $8,200.00 (referring to Tobin's debit balance as of January 6, 1933), I assume that money went to the Carlinville job. I don't have any way of knowing. It was advanced to Mr. Tobin for that purpose. I don't know where

it went. When I gave checks for these various amounts payable to Mr. Tobin I don't know where that money went. It could not have gone into the Havana job because that was done at that time, but it could have gone elsewhere than the Carlinville job. The check for $300.00 in April, 1932 to the Tower Grove Bank was to Mr. Tobin's credit. It wasn't made out payable to the order or credit of Tobin because I would send the deposit slip along with it, as I think the bank's records would show. There is no endorsement on that check. Some of these checks were made payable to Tobin and others direct to the Tower Grove Bank because sometimes Tobin would be in the office and collect it and
127 other times he would not be. The check dated November 5th for $300.00 shown me, appears in the record book as a charge for $1,300.00. That is because I told the young lady to add $1,000.00 for interest, and she just charged it in one item. At that time Mr. Tobin represented to me that he had considerable profit in both jobs, and I figured that would be fair. The check shown me for November 9th for $350.00 appears in my book at $1,350.00, the item including a charge of $1,000.00 to take care of a Huttig Sash and Door bill which was due and which came to my attention. I have not paid that bill yet. I charged Tobin in my account because I had guaranteed the payment of that item. On November 16th there was a check for $75.00 and the item entered for $1,575.00, the $1,500.00 representing a bill which came in on the Havana job from the Illinois Steel Bridge Company. I have not paid that $1,500.00. Tobin owes me that amount according to my account, because I had guaranteed the payment of the item. I have evidence of that guarantee which I made to the Maryland Casualty Company. My explanation is that the bills that I was responsible for should have been deducted from this $5,258.00 credit on November 15th, but I did not have them, and I only got them as somebody called me and told me he had something coming. The money I received from the government on the Havana job was sufficient to pay the bills on that job; it did not pay them, as it was not used for that purpose. It was turned over to Tobin for use on this Carlinville job. On December 10th there was a $300.00 check and my account shows an entry of $1,300.00, the balance representing a bill that had come in from the Peoria Stone and Marble Company for $1,000.00. That has not yet been paid. On my ledger, the item on January 19, 1932 is for a $1,000.00 check returned. That means that Mr. Tobin had given me a check which was credited as of January 12th, for $1,000.00, which was unpaid because the bank had closed. The $115.00 item on August 19th was a check Mr. Tobin gave me that was returned unpaid. That

one seemed to have bounced back. I did not notify the surety company to that effect at that time. The check for $1,600.00 on October 15th was also returned; that was later paid on October 31st.

128 It was on December 21, 1932 that I got the power of attorney from Tobin. He did not tell me that the National Surety Company was receiving bills from labor and material men claiming they had not been paid. When he gave me the power of attorney he said there were going to be some bills to pay and he wanted me to handle these funds. I don't know why he wanted me to; he had done that before. I don't believe I asked him for this power of attorney. I was willing to handle the funds because I wanted my money back, and I wanted to see that the bills were paid. At that time he owed me approximately $8,200.00. I think I advised Mr. Hauck either that I had the power of attorney or that Mr. Tobin would give it to me. I am not sure that I notified Mr. Hauck that I had received it. I did not notify him that I had sent it in to the Treasury Department; I was under no obligation to do so. I was interested in seeing these accounts paid, and I wanted to work with the National Surety Company to that end, and so told Mr. Hauck. I don't recall talking with Mr. Erbs in January, 1933, about the intention of the National Surety Company to start an injunction proceeding if these funds were not placed under joint control; I think Mr. Tobin was in a time or two and there was a conversation of that kind. Mr. Hauck told me a number of times that the National Surety Company would do that if Tobin did not agree to this. I did telephone to you, Mr. Mayne, before I went to Washington in January of 1933, and said that I was ready to work with the National Surety Company provided I could have joint control of these funds with them, and you told me that was not acceptable and that you would have to proceed to enjoin the collection of these funds, and at that time I had the power of attorney. I received these estimates from Mr. Tobin for the January and December payments, which he secured from the engineer, either the day I left here for Washington or the day before. I did not know at that time that Tobin was in your office and that he told you he would secure that power of attorney for you and enter into the joint control. I did not advise you in that telephone conversation that I intended to go to Washington to get this money. I did no know at that time that I was going to Washington because I did not know that Mr. Tobin would give me the estimates. I went to Wash-
129 ington instead of mailing the estimates because I had considerable money at stake there; I wanted to pro-

tect myself. The item in my account of $122.34 on February 6th is for expenses of the trip which I charged up to Mr. Tobin. I don't think the matter of charging the expenses was mentioned, but Tobin told me to go to Washington on the day he gave me the estimates. The check I received I cashed in Washington, and I brought the money home in the form of a bank draft payable to me. My motive in cashing the government check in Washington was to get the money. I got it in cash and bought a draft. The money now is in the Tower Grove Bank in my account. The draft was for $10,448.10 and I deposited it in the Tower Grove Bank. I figure I have paid this account out of that draft. My account does not show that I have paid it by a credit entry. I checked over the account with Mr. Tobin one day recently since I came back and he approved it, and he is paying me for my expenses to Washington. The account was checked last Saturday. It was not settled but he and the young lady who keeps my books checked it up and I think they said their figures agreed. As to the $1,000.00 interest payment, I don't think our books agreed; I had previously agreed to deduct that charge. The reason that is shown in the memorandum filed in court this morning is that I presented my book as it is, and that charge had been made when I felt Mr. Tobin had profited on these jobs and could afford to pay interest for the use of that money.

I remember the discussion in your office on February 15th when the order to show cause was returnable here. I did not know exactly how much Tobin owed me then. When you asked if he owed me any money I said yes. I remember your asking Mr. Tobin how much money he owed me and he said he did not know. It is true that I stated that I wanted to see these accounts paid. I have not had occasion to check up the amount of material and labor bills outstanding. I saw the bills in your office and they aggregated some $13,000.00 at that time; I did not check them over, and I did not hear anybody check them over with Mr. Tobin. I don't know how he will be able to pay $13,000.00 or $15,000.00 worth of bills out of the balance on hand. I feel that I am entitled
130 to money that I advanced him to carry on this work.

Now, if you will add $7,704.00 and $5,258.00, which were receipts from the Havana job, and deduct the items paid on the Havana job, I will admit that the balance is the amount that went in the Carlinville job. Well I admit that that is the amount advanced to Tobin for that purpose. I am not in a position to say it went there. It is not fact that the money I got from the government on this Carlinville job is being used to pay Mr. Tobin's bills on some entirely different job.

I can show it from my statement. On the Havana job I collected a total of $12,962.00. On that job I paid out $724.35 at one time, $2,330.92 at another time, and $2,597.39 at another time. In addition to that I have Mr. Tobin charged with $3,500.00 for the accounts of the Hutting Sash and Door and the Illinois Steel Bridge and Peoria Marble, which I have not paid. Mr. Tobin advised me this morning that the proper amount of those bills still outstanding which I should have deducted from the $5258.00 check, amount to $3,638.71. The difference between the $12,962.00 I received and the money that was paid out on the Havana job represents the amount that went to Mr. Tobin on the Carlinville job.

When I received the power of attorney from Mr. Tobin is was filled out in my office. I had the forms in my office. Tobin came in and told me he was going to give me the power of attorney and then I prepared one. The understanding between Mr. Tobin and myself, after this power of attorney was secured, was that I was to credit myself with the money due me and pay all the balance of the bills that were outstanding. My understanding was that there was more than ample money to pay them. I talked with Mr. Harlow and Mr. Hauck numerous times about what was going to be done. So confident was I that there were enough funds to pay the bills that I agreed with them, if they wanted me to collect the money, to guarantee the payment of these bills. I am not still ready to do that because there are more bills outstanding I think that I had understood at the time. Before I received the power of attorney Mr. Hauck told me that there were bills outstanding in the amount of about $9,500.00. At that time there was some $17,000.00 due from the government. I don't know if there is any additional amount due Mr. Tobin on the Havana job from the government. Mr. Tobin
131 tells me there is a claim for about $2,200.00; I don't know what disposition he is going to make of it, or whether the government will pay it. I had no conversation with Mr. Erbs, attorney for Mr. Tobin, regarding this power of attorney. Mr. Tobin did say something about revoking the power of attorney. He said he could revoke it, I don't think he said he was going to revoke it.

Redirect Examination.

By Mr. Bull:

I will say that I am willing at this time, after proper adjustments are made in my account reducing the interest charge from the $1,000.00 arbitrary figure to 6% on the average balances, and after further adjustments are made, taking into account these outstanding bills on the Havana job which I have guaranteed, to permit the balance left, after

my account is settled, and which will be somewhere around $1,300.00, to be applied and used in whatever manner is deemed proper for paying off the present outstanding bills. I am ready and willing to have either Mr. Tobin or the court revoke and cancel the power of attorney which I filed or delivered to the Treasury Department.

Examination.

By the Court:

As to this draft for $10,400.00 I collected I am not applying any part of that to cover outlays made on the Havana job. I collected more money of Tobin's than I paid out on the Havana job. He overpaid me on the Havana job, and money was paid on the Carlinville job which should have gone to pay the Havana accounts, but I did not have a record of them at the time. I refer to the outstanding Havana accounts of $3,638.00. I am not seeking to hold any money now to pay up debts that accrued on the Havana job.

MRS. ALICE NEEL, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of defendant Martin, as follows:

Direct Examination.

132 By Mr. Ball:

I am employed in the office of Guy S. Martin in the Pierce Building. My duties are secretarial and stenographic, and I have recently been keeping his accounts and records of various business transactions. I have been doing that since the latter part of October, 1932. The ledger sheets which have been marked Defendant Martin's Exhibits I, J, K and L contain entries made by me beginning with the items for August and September which were put in in October, because the other girl had left them out. All of the entries from then on through the record were made by me. I usually posted the insurance entries every two weeks and the checks the beginning of each month for the month previous. I made the entries for checks from month to month as they came back from the bank. As to the item on November 5th for $1,300.00 when there was a check for only $300.00; that is where Mr. Martin told me to enter interest. That same situation applies to the other items where charges were added to the check items as people called up about their accounts.

Cross-Examination.

By Mr. Mayne:

The only other book we keep is for insurance. We have no journal or cash book. When Mr. Martin would tell me to

charge up $1,000.00 I would put it in the ledger. I would take Mr. Martin's word for the charge, and put it down in the book the way he told me. I would hear these people calling up about their accounts, and when he told me to enter them I just put them in. That sheet (indicating) was made up some time after November. This balance here shown of $9,610.84 is the correct balance according to the books. We did not pay out these items (indicating) but Mr. Martin guaranteed to pay them. We do not have any system or records in our office which would allocate the amount of money paid out for Mr. Tobin on the Carlinville job and on the other job; it is all in one ledger. This is the only ledger we have of Mr. Tobin's account. The reason the credit of some $10,400.00 received is not shown is that we wouldn't do that until the first of March, when I had
133 all the charges and credits on checks. I do show other items for February; that is, cash. Money that Mr. Martin handed to Mr. Tobin I charged. I don't keep a record of that outside of that book.

GEORGE MCFAUL, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendants Albert Clement Tobin and Guy S. Martin, as follows:

Direct Examination.

By Mr. Bull:

I am employed by Maryland Casualty Company as a bonding claim adjuster. My company was on the Havana Post Office bond which was executed on August 29, 1931. My office file which I have brought here shows that the Havana job was finished about in October, 1932. It was about in May, 1932, that Mr. Martin and I took up the matter of paying certain outstanding claims on that job. The situation arose after Mr. Tobin had some difficulty with the bank at Havana. I have no direct knowledge of what that difficulty was. The question was whether or not we would receive the funds from the government from that time on and disburse them. Mr. Tobin objected to the arrangement, and we asked if we could not appoint a trustee to receive and disburse those funds, who would be responsible for the disbursement, and we finally agreed on Mr. Martin to do that work. In that connection there was an agreement running from Mr. Martin to my company. This (the witness producing a document) is a copy of the agreement the original of which is in our home office. (This paper was here marked Defendant Martin's Exhibit "M", the

witness testifying that the original was dated May 25, 1932, and was read in evidence.)

Cross-Examination.

By Mr. Mayne:

At the time this indemnity agreement was entered into it was impossible to determine how much Mr. Tobin owed on outstanding claims. We had notification of only perhaps two or three of them that were definite up to that time, but the work was still in progress and these bills accumulated from that time on.

134 I do not know how much had accumulated that had not been paid by Mr. Tobin; there is no way to determine that. (Referring to file). Approximately all I had on file at that time were bills from Lacrosse Lumber Company amounting to about $350.00, and from Alexander King Stone Company. The only difficulty our company was having with Mr. Tobin was in regard to those two bills, and it was simply that we were notified of the fact that those two bills were on file. At this time Mr. Martin is placing some business with us; I do not know if he has a power of attorney with our company. I think there are some outstanding accounts that Mr. Martin has never paid on this Havana job. A statement as to the trust fund is supposed to be furnished at various intervals. The last statement I have (examining file) was reported on December 13th, but it was simply a statement that some of the bills were still outstanding, and that we would get a report later. It did not set forth what bills were outstanding. I have no letter to the effect that Mr. Martin was guaranteeing the account of the Huttig Sash and Door Company in the amount of $1,000.00. Our evidence of such guarantee is only insofar as his agreement with us to disburse those funds and guarantee that they would be applied to all of the bills. It would be hard to say whether we had any conversation concerning his agreement to pay the Huttig Company $1,000.00, because we had several conversations regarding settlement of these various bills. The same remark applies to the Peoria Stone and Marble Company account, and that of the Illinois Steel Bridge Company. We have no interest in whether or not those claims have been paid as long as there are any funds to the credit of the trustee. There is nothing due on the Havana job now from the government. The final voucher of some $5,248.00 having been paid. There is probably a claim for extras which has not yet been allowed. We have no report from Mr. Martin except the letter of December 14, 1932, setting forth how much money he has in his possession

for payment of Havana bills, and we have no statement of account from him as to how many bills he has paid, but I have the releases on file as they came through.

ALBERT CLEMENT TOBIN, a witness of lawful age, being duly produced, sworn and examined, testified on be-
135 half of himself and Guy S. Martin as follows:

Direct Examination.

By Mr. Bull:

I am engaged in the general contracting business and have been following that work since about 1920. I operate as an individual under the name of A. Clement Tobin & Company. As such I had government contracts for the construction of the Carlinville and Havana post offices. During the progress of those two jobs I have kept or run an account with Mr. Guy Martin. I had some small dealings with him prior to 1930 or 1931 and have had quite a bit of dealings with him from September, 1931, up until the present time, which started with the Havana job. Mr. Martin advanced me money from time to time, that practice continuing up until this last January. I keep books showing that account, and within the last few days I checked them over with the books of Mr. Martin (producing some books). My books show the beginning of this account as on September 6, 1931 and it runs right on until February 8th, this year. The debits total $24,525.10 and the credits are $24,251.21. I executed a power of attorney to Mr. Martin about the middle of December (1932). At that time I did not know exactly the amount of outstanding claims on the Carlinville job. My understanding at that time was that it was about $9,500.00. The account as I have given it takes into consideration the receipt by Mr. Martin of some $10,400.00. That appears in my books on February 8th in two checks, one for $3,942.00 and one for $6,506.10. After I posted my books to February 8th I went over the books that Mr. Martin kept. There were some discrepancies between his account and mine. I had failed to enter these two payments, one for $115.00 and one for $600.00. His account should have been credited with a riot and civil commotion policy which ran from month to month. The total was about $27.00 or $28.00 and there was a charge for telephone and telegraph of about $1.60, and then there were some expenses for the Washington trip which I think were about $122.00. Taking those five entries and putting them on my books the way they should be my account will balance with Mr. Martin's within $.26. I recognise those

items, shown on Mr. Martin's books and not on mine,
136 as proper charges.

There was an undertaking by Mr. Martin to assume payment of some bills on the Havana job. Those bills which are still unpaid amount to approximately $3,638.00 and some cents. For bills assumed by Mr. Martin on the Havana job I credited his account, (Referring to thirty-one checks of the Tower Grove Bank). I know how those checks were drawn and paid. According to a previous arrangement I allowed one Havana check for $7,704.00 and a further check for $5,258.00 to go to Martin, these being funds paid by the United States Treasury, to apply upon the account of the Havana job. Mr. Martin had a power of attorney on that and an agreement with the Maryland Casualty Company, and at that time we undertook to pay bills. I did not have sufficient money in my own account, so by agreement with Mr. Martin I made out my checks the same as I always did on the Tower Grove Bank and at the end of the day I would tell him that I had drawn so many checks, and the amounts, to pay certain bills, and he in turn would tell the Tower Grove Bank, and they would be charged against his account in place of my account. These other checks (examining checks handed to him drawn to the order of the Tower Grove Bank or to the order of A. Clement Tobin & Company) were issued at times when I was at Havana or Carlinville and would need money. I would call Mr. Martin on the telephone and tell him or write him that I needed certain funds, and he would deposit in the Tower Grove Bank to my account, and I would go ahead and draw checks against that. These four deposit slips to my account (exhibiting deposit slips of the Tower Grove Bank) were written by Mr. Martin. My Tower Grove Bank deposit book which I have here shows deposit items. Most of the deposits I attended to, but sometimes I would send that book down by a relative or whoever would be around. As to the money paid out to material and labor men on the Carlinville job, I myself did not pay any. At the beginning of that job I had a man who paid the bills and labor. I brought money up there to Carlinville and those are the checks (indicating), that my man disbursed there (producing bank book of C. H. C. Anderson, Inc., Carlinville, Illinois, and a number of checks bearing the signature
137 "A. Clement Tobin & Company, by Joseph E. Sander, Superintendent.") That man was my employee and I authorized him to make payments by check. Other than the Anderson banking house we also did business later on with the Carlinville National Bank and with the Springfield Marine Bank. I drew no checks against the Carlinville Nation-

al Bank. I did draw a check against the Anderson banking house, transferring $2,500.00 to the Springfield Marine Bank. Of the money I brought up there some was money I got from Mr. Martin and some I got from the government. In addition to the $2,500.00 deposited in the Springfield Marine Bank (referring to a book) I deposited on April 18th $4,716.00, on April 29th, $2,200.00, on April 28th, $2,000.00 and on May 14th $2,900.00. That was all in 1932. I think the $4,716.00 was a government check, and the other funds were money obtained either through Mr. Martin or transferred probably from the Tower Grove Bank. I disbursed that money to pay bills, some on Havana and some on Carlinville.

I recall meeting with Mr. Mayne on Saturday, February 4th, at which time we discussed the subject of joint control of the funds then due on the Carlinville Post Office. I never made any statement to Mr. Mayne to the effect that I did not owe Mr. Martin any money. I don't recall that the question of my accounts with Mr. Martin was discussed on that occasion.

Cross-Examination.

By Mr. Mayne:

The contract for this job was for $49,500.00. Before Mr. Martin received this $10,400.00 I collected approximately $33,000.00. I can show from my books how I disbursed some of the $33,000.00 I collected but I haven't all of my cancelled checks, and my books are not posted up to date. I have no account here which shows the total amount I have paid out to my creditors. There would have to be a compilation after the ledger is posted to date. Nearly all, or about 85 to 90% of the work on the Carlinville job was let out on subcontracts. When I submitted the estimate of $49,500.00 to the government I was reasonably certain that I could build the post office for that amount and have a profit. From present indications I would say I probably underestimated this job, I don't know as yet to what extent, but I wouldn't say as much as $8,000.00 or $9,000.00.

138 In December 1932 I was getting in difficulties and I had a conversation with Mr. Hauck, of the National Surety Company at that time, in which he told me that he wanted to have joint control of the balance of the funds due from the government. When he suggested the joint control, I agreed to take it with him and let all the funds come in, but when he made up the paper he had a power of attorney which gave him absolute control and said absolutely nothing about my having anything to do with it at all. When

I looked at that and told Mr. Hauck that I was perfectly willing to arrange for the surety company to have a representative and for me to have a representative, he said "Oh, no, it cannot be done." The power of attorney was made out to the National Surety Company. I told him I wanted to see my attorney about it, and would let him know and bring it back to him. Instead of taking it to my attorney, I took it to Mr. Martin. I don't know who prepared the new power of attorney directed to Mr. Martin, but I signed one at Carlinville and I think I sent it back to Mr. Martin some time in December. Mr. Martin prepared a letter to the Treasury Department which I also signed. I did not notify Mr. Hauck that I had turned the power of attorney over to Mr. Martin. Mr. Martin did not tell me he had sent the power of attorney to Washington, and I did not know he had done so until around the first of February. When I was in your office on February 4th I did not know absolutely that the power of attorney was in Washington and I did not know that Mr. Martin was on his way to Washington. I did not know that until Saturday night. It was our understanding at that time that you were to prepare a joint control agreement and Mr. Erbs was to see Mr. Martin on Monday morning to get the power of attorney. On Saturday afternoon I authorized Mr. Martin to go to Washington to collect that money for me; I did that because if the money got in your control then I would be sitting on the outside looking in. That Saturday morning in your office I did say that I would like for Mr. Martin to have joint control, and you said "Oh, no, nothing doing with Mr. Martin." The reason I did not tell you I wanted Mr. Martin to get this money and that I was going to send him to Washington to get it was that you did not ask me and I did not have it in mind at that time. I made up my mind to send Mr. Martin to Washington on Saturday afternoon. I did not
139 notify Mr. Erbs that Mr. Martin had gone to Washington.

The contract I secured from the government was conditioned upon my obtaining a bond for $25,000.00. I did not try to secure a bond from any other company before I took it up with Mr. Martin. I don't recall at this time but I probably told Mr. Martin that I had at least $9,000.00 profit on the contract, and that the job was all subcontracted. About five or six of the subcontractors or probably 25 or 30% of them were also under bond. I cannot account for the loss I am going to sustain on this job at this time. I have other books than the ledger account which you examined, but some of them are up at Havana, Illinois, and some are filed. I

tried to get them down here since this proceeding was filed, but the parties who were supposed to bring them didn't get in. I believe those books will fully disclose the payments I have made on this job. I do not know what percentage of the amount of work was sublet under bond.

At the time we were discussing this matter in your office I informed you that I did not know how much I owed Mr. Martin. Yes, I had my books at that time. At that time a restraining order to be entered in this case was prepared, and also a letter addressed to my attorneys (here the witness identified Plaintiff's Exhibit "E" as a draft of the restraining order, and Plaintiff's Exhibit "F" as a draft of letter referred to, and stated that he had read them or heard them dictated at the time of their preparation. Over the objection and exception of counsel for defendants the witness was permitted to testify that they were apparently satisfactory to the witness at that time.) Between the time when I left your office in the morning and when I returned in the afternoon I was not with Mr. Martin. When I returned I had pondered over those things and they were not even satisfactory to me.

The labor and material bills listed on Plaintiff's Ex-
140 hibit "G" and which totalled $13,078.85 I have not paid. Some of them are correct and some are not correct, but in dispute. The correct amount of my outstanding bills on this job is probably between $9500 and $10,000. (Here the witness explained various items on the list some of which he stated he owed in full and some of which he stated were subject to adjustments, or were not owed. He then stated in answer to questions as to how he could pay the amount of outstanding bills with the $5,700.00 still due from the government, that he had one other resource, to-wit, a claim against the government that probably will be settled, that while he was heavily involved with another surety company that has a contingent claim against him for $35,000.00, he could arrange his financial position to settle all his debts on the Carlinville contract.)

None of my subcontractors defaulted on this job. About 25% of the number of subcontractors were under bond. The witness then testified as follows concerning the deposit and withdrawal items in the several bank books which he had previously produced, to-wit: The bank book of the bank upon which this pack of checks shown to the Court yesterday were drawn (the banking house of H. C. Anderson) shows deposits of $8198, and withdrawals of $8180.39; that the Carlinville National Bank account shows deposits of $2450 and

withdrawals of $2360 for the period from July, 1932, to October 22, 1932, and for the period from June 25th to July 30, 1932, deposits are shown of $1478 and withdrawals of $1302, being the only money that went through those two banks; that he was not sure where he deposited the government checks that he received from time to time, but if he only shows a total deposit from April to June of $8198, that would be more than was received from the job, because he did not get an estimate until some time in April, and he thought
141 the first estimate was $1397, the next one $1852, and there was something like $3,000 or $4,000 which would have brought it up to about June. That he received some $33,000 on this government work before Guy S. Martin received the $10,400.

"Q. And can you show me in any of these books where you deposited $33,000?

A. I may be able to do it, it can be proven. Will you give me the balance of my bank books?"

The witness was then handed some bank books and proceeded to point out deposits in the various bank books totalling about $22,000, which the witness stated did not include one government check of $6480 that was not received on the Carlinville job, and another for $4680 which was not on the Carlinville job.

"Q. All right, that is about $22,000. Now, where is the rest of it?

A. Well, I suppose some, that way, that was sent in that way, that checks were mailed in that way, they were deposited in the bank. I can take and show from my checks the checks that went out, that the money disbursed was more than was received.

Q. Well now, where are the deposits of some $9600 that Mr. Martin gave you from time to time, except these checks that went through his own account? These checks aggregated about $5,000, as I remember, yesterday, and there is four thousand of other checks. Where did that money go?

A. Well, these entries in the book here will show some of it, and these deposit slips here will show others, and some of it will be where he gave me checks and I deposited
142 them in other banks, that I deposited some of it in the Carlinville National and also some in Anderson's Bank, and some of it in the Springfield Marine Bank.

Q. Well, these are—

A. (Interrupting): It is pretty hard for me to take and pick out of this run of stuff here this way what is Mr. Martin's and what is somebody else's.

Q. Well, can you show me a sheet in your ledger which will show the deposits of all the checks that you received from the Government, and the disbursements against those checks?

A. No, not all of them.

Q. Have you such a record as that? A. I have.

Q. Where is it?

A. It is in my works file at Havana, Illinois."

The witness further testified that the deposit slips he indicated were duplicate deposits made by Mr. Martin in Tobin's name in the Tower Grove Bank, and that they only showed deposits of $300, $700, $300 and $50. That the witness did not think he had got any more deposit slips from Martin that Martin claimed to have put in the witness' name, but that he was not sure. He was then shown the last page in the record of the account of Guy S. Martin, which was marked Plaintiff's Exhibit "H", and the witness stated that the entries were made by him and showed a credit balance of $24,251.21 and a debit balance of $24,525.10. He further stated that although he had made up his account on February 8th the reason why he did not tell Mr. Mayne how much money he owed Martin on February 15th when he was in Mr. Mayne's office was that he evaded the question, although he (Tobin) then knew the status of his account with Martin. He then stated, in answer to a question as to whether he could explain how the job reverted from a profit of $9,000.00 to a loss of at least
143 $10,000.00, that he could account for every dollar that was spent, but that the records that he had in court were not complete, although he had additional records elsewhere; that he brought everything in that he had been asked to, which was in St. Louis.

Redirect Examination.

By Mr. Bull:

The calculation I made as to the claims totalling some $13,578.00 shown on the list referred to, brought the amount of proper charges actually payable down to $9,348.96. After posting my account with Mr. Martin to February 8th I made a subsequent check with Mr. Martin's books, and after taking items into account which were not in my books, to-wit, charges of $600 and $115, there was a difference between my books and Mr. Martin's books of only $.26.

Recross Examination.

By Mr. Mayne:

At the time when you asked whether I owed Mr. Martin any money or Mr. Martin owed me anything we did not have any

ledger sheets before us. So far as I know Mr. Martin brought his ledger sheets to your office late that afternoon, and that was the first time you saw them.

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144 OLIVER F. EBBS, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of defendants, Tobin and Martin, as follows:

Direct Examination.

By Mr. Bull:

I am associated with the firm of Carter, Jones & Turney, and as an attorney have been consulting with Mr. Tobin in his business dealings for about five years. I recall a meeting at Mr. Mayne's office on February 4th, in which I spoke with him for ten or fifteen minutes. The discussion concerned a proposition that had been made at a prior meeting of having three men act as a committee to disburse the money that was left with the government, and Mr. Mayne advised me that arrangement was not satisfactory. On February 4th Mr. Tobin came into my office and said he understood there were rumors he was in Washington and asked me if I would go with him to Mr. Mayne's office to satisfy Mr. Mayne that he, Tobin, was not in Washington. Mr. Tobin and I went over there, and we talked about the agreement and Mr. Mayne said again that the three man proposition was not satisfactory. I suggested having a man from each side, and Mr. Mayne said "No, and if you insist on it [illegible] of the two." I then said that if he would [illegible] agreement whereby he had it signed. Mr. Tobin's representative [illegible] Mayne stated he would [illegible] circulating a list of [illegible] put up until a list, but that I [illegible] When we left I said to Mr. [illegible] him again when [illegible] to, as I understood it, to [illegible] agreement. I told Mr. Mayne [illegible] of attorney from Mr. Martin, which I [illegible] surrendered. When I made that statement I naturally assumed that it was still in Mr. Martin's possession, and did not know that it had already been surrendered in Washington. I understand that we had never represented Mr. Martin up until the time for filing the return in this case, so that I had no way of requiring Mr. Martin to turn over any papers of his to me. On the occasion of our meeting of February 4th the sub-

145 ject of the indebtedness between Mr. Martin and Mr. Tobin, or of the amounts between these two men did

not come up. No reference to those accounts was made, and the only reference to accounts was, as I have stated, that Mr. Tobin would get up a list of all bills due on the job. Mr. Mayne at that time did not ask Mr. Tobin anything with reference to whether or not he owed Martin money.

Cross-Examination.

By Mr. Mayne:

I recall telephoning you in January, 1933, and at that time we talked about joint control. I stated that Mr. Tobin was out of the city and that I would get in touch with him, and I said that in the meantime there would not be any money collected from the government on this job or disbursed without notifying you or the surety company. So far as Mr. Tobin was concerned, I told him that absolutely. At that time you mentioned the institution of a suit in the nature of the one you filed, and I asked you to defer that because it would ruin Mr. Tobin's chance of getting any bond in the future on building work. You told me you had a petition ready, and I suppose you did hold off the filing of the suit. Mr. Tobin did not tell me that on December 21st he had written to the Treasury Department authorizing Mr. Martin to collect these funds. I knew nothing about such a letter, and he did not give me a copy of it. On the morning of February 4th or previous to that time I told you that I was trying to get the power of attorney from Mr. Martin. My effort consisted of calling up Mr. Martin. I don't recall exactly what he said; I am sure he never told me that he had sent it to Washington. I don't think he ever said he would turn it over to me. I expected that I could get the power of attorney from Mr. Martin because I took the position that if your company was going to agree to joint control I would insist that Mr. Tobin produce any papers or any powers of attorney that he had written. I told you to go ahead and prepare the joint control agreement because I fully expected to turn over to you the power of attorney. Mr. Tobin did not call me on Monday morning and tell me that Mr. Martin had gone to Washington. On Monday following February 4th I tried to get Mr. Martin at his
office, but it was said that his secretary had gone home
146 because of sickness and that she had no telephone at
home, and she alone had Mr. Martin's address. I first learned that Mr. Martin had gone to Washington on the morning of the 9th when I think you told me the news.

As to the dispute concerning whether [—] asked Mr. Tobin the amount of his indebtedness to Mr. Martin while in your

office, there was some statement about how much he owed creditors. He said he could not tell you; that he would have to get up a statement, and I instructed him to prepare that statement. I believe you are mistaken, Mr. Mayne, about saying that you asked Mr. Tobin if he owed anyone else other than these creditors, and I don't think he made any statement to the effect that his only debts were those due creditors on this job, or that he did not owe anyone else. Mr. Tobin has not gotten that list into my hands; he may have given Mr. Bull some figures.

GUY S. MARTIN, being recalled, testified as follows:

Further Cross-Examination.

By Mr. Mayne:

At the time I signed this bond for the National Surety Company Mr. Tobin told me that his profit would be about $7,000.00 or $8,000.00. He told me practically all of the work had been subcontracted. That induced me to sign this bond. If it had not been subcontracted I would have felt some hesitancy about signing it, but I felt that I was amply protected if the profit was $8,000.00, because all the subcontractors were to be bonded. It was on the strength of this statement that I signed this bond for the National Surety Company. I have not been able to check up with Mr. Tobin to ascertain how he could have a possible loss of at least $10,000.00 in this job. I have asked him for a statement of the bills outstanding, but he has never given me one. From what investigation I have made I am of the opinion that there is a loss, but I am not in a position to state what I consider the amount of it. On February 15th I was in your office for a short time with my attorney, Mr. Bull. With reference to Plaintiff's Exhibit "E", I did not see that order but I heard it dictated that morning. I made no statement concerning it, I had not talked it over with my attorney so I made no comment. About five o'clock in the afternoon I saw the proposed order and at that time it was not satisfactory. That also applied to Plaintiff's Exhibit "F", the letter, which I did not see but I heard it dictated.

Plaintiff's Exhibit E.

147 The draft of proposed restraining order introduced in evidence and marked Plaintiff's Exhibit E, omitting the caption and lines for signatures, was as follows:

"This cause coming on to be heard on the order to show cause why a restraining order should not issue against defendants, Albert Clement Tobin and Guy S. Martin, the parties, National Surety Company, plaintiff, and defendants Albert Clement Tobin and Guy S. Martin, appearing by their re-

spective counsel, and advising the Court that a temporary injunction may issue, without prejudice to the rights of either party, against said Albert Clement Tobin and Guy S. Martin from receiving any further funds or payments due from the United States Government on contract for the construction of the Post Office building at Carlinville, Illinois, and temporarily restraining and enjoining said Albert Clement Tobin and Guy S. Martin from disposing of any of the funds heretofore received from the United States Government, on account of the construction of the Carlinville, Illinois, Post Office building, until further order of this court.

It Is Hereby Ordered And Decreed that a temporary injunction and restraining order be issued against said Albert Clement Tobin and Guy S. Martin from receiving any further funds or payment from Walter F. Brown, Postmaster General of the United States, Ogden L. Mills, Secretary of the Treasury of the United States, and Walter O. Wood, Treasurer of the United States, or either of them, on account of the construction of the Carlinville, Illinois, Post Office building; and that said defendant Albert Clement Tobin be temporarily enjoined and restrained from disposing of any funds now in his possession, excepting such amount of money as may be agreed to between the parties to be used for expenses of said defendant, Tobin, heretofore received from the said defendants, Walter F. Brown, Postmaster General of the United States, Ogden L. Mills, Secretary of the Treasury of the United States, and Walter O. Wood, Treasurer of the United States, or either of them, on the Carlinville, Illinois, Post Office job, and that defendant Guy S. Martin be temporarily enjoined and restrained from disposing of any and all funds now in his possession or control, which heretofore has been received by him from the said defendants, Walter F. Brown, Postmaster General of the United States, Ogden L. Mills, Secretary of the Treasury of the United States, and Walter O. Wood, Treasurer of the United States, or either of them, on the Carlinville, Illinois, Post Office job, excepting such fund as may be agreed to between the parties to be used for expenses of said defendant Albert Clement Tobin and/or Guy S. Martin, until the further order of this court.

It is further ordered that this cause be passed for further hearing until February 24th, 1933.

It is further ordered that by agreement of the parties, this order shall not prejudice the rights of either party on further hearing in this cause.

148 Dated at St. Louis, Missouri, this .... day of February, 1933."

Plaintiff's Exhibit F.

The letter referred to in the evidence marked Plaintiff's Exhibit F and introduced was dated February 15, 1933, was addressed to Mr. Oliver Erbs and Mr. Richard S. Bull, Attorneys for Messrs. Albert Clement Tobin and Guy S. Martin, was signed National Surety Company, by Fordyce, White, Mayne and Williams, Attorneys, and read as follows:

"Pursuant to our understanding made in connection with the above styled case, in which a temporary restraining order was issued by consent, it is our understanding that Mr. Tobin and Mr. Martin will arrange to effect a settlement with the labor and material creditors on the amounts such creditors claim to be due for the construction of the Carlinville, Illinois, Post Office building; that Mr. Tobin and Mr. Martin will arrange to see the creditors and endeavor to agree on the amounts claimed to be due, and that a list of such creditors will be submitted to you and the writer for the purpose of ascertaining the exact amount to be paid out of the funds in possession of Mr. Martin and the balance due from the Government.

Upon ascertaining this amount we will agree to allow the payment thereof by Mr. Tobin and Mr. Martin without prejudice.

It is further understood that the consent order for a tempororay injunction shall not prejudice the rights of your clients in the event the plan to adjust all matters in dispute and controversy does not materialize.

It is further understood that in the event the plan as outlined cannot be consummated by February 24, 1933, a further extension will be granted under the restraining order, in order to satisfactorily adjust the matter.

We hereby agree that $300.00 may be released immediately to cover expenses of Mr. Tobin and/or Mr. Martin in working out settlement with the creditors.

Kindly note, on a carbon copy of this letter, whether this arrangement is satisfactory to your client."

Plaintiff's Exhibit G.

This exhibit, referred to in connection with the testimony of the witness A. Clement Tobin, consisted of a list of twenty-one items, totalling $13,078.85. As such exhibit is not deemed to have any materiality to any of the issues here presented, it is not set forth herein.

Defendant Martin's Exhibits G and H.

Said exhibits are not set out herein in their entirety for the reason that as such they are not deemed material to the issues raised herein, and for the further reason that the same are not now available, but such exhibits, as shown by
149 the testimony hereinbefore set out were as follows:

Exhibit G was a carbon copy of letter to the Treasury Department dated December 28, 1932, and signed by defendant Guy S. Martin, with which was forwarded the power of attorney executed by defendant A. Clement Tobin.

Exhibit H was a carbon copy of a letter dated December 21, 1932, and addressed to the Treasurer of the United States by A. Clement Tobin, asking that all checks payable to the latter be forwarded to Guy S. Martin.

Defendant Martin's Exhibits I, J, K and L.

Said exhibits, consisting of ledger sheets from the records of defendant Guy S. Martin, showing the account of defendant A. Clement Tobin with Mr. Martin and identified in the testimony of defendant Martin, while introduced in evidence are not set out herein for the reason that all of the entries contained on said sheets are reflected in and duplicated by the entries shown in Defendant Martin's Exhibits N and O, hereinafter set out, and are further explained by the testimony of the witnesses herein appearing.

Defendant Martin's Exhibit M.

This exhibit, identified by the witness McFaul as a copy of the agreement entered into by Mr. Martin with the Maryland Casualty Company, after recitals to the effect that an indefinite portion of the $14,000.00 held by the United States government Post Office Division to the credit of A. Clement Tobin & Company was due and owing to persons with whom the said A. Clement Tobin & Company had contracted indebtedness for labor and materials, that it was the desire of the Maryland Casualty Company that these funds be so disbursed that all such indebtedness incurred in the construction of the Post Office at Havana, Illinois, should be paid, and that A. Clement Tobin & Company had executed powers of attorney in favor of Guy S. Martin for the purpose of the agreement, it was therein provided as follows:

"Now, Therefore, the undersigned, Guy Martin does hereby agree to disburse the aforesaid funds in the manner indicated,

and upon being fully satisfied that there no further debts existing by reason of which the Maryland Casualty Company could be held liable for debts incurred by A. Clement Tobin & Company in the construction of the said Post Office at Havana, Illinois, the undersigned Guy Martin will thereupon release unto the said A. Clement Tobin & Company the remainder of such funds referred to above.

It Being Further Provided that the said Guy Martin will withhold the maximum amount claimed by any lienor in the event of a dispute between the said A. Clement Tobin & Company and the said lienor, and that the said Guy Martin shall hold the said Maryland Casualty Company and the said
150 A. Clement Tobin & Company harmless by reason of any depository liability."

The foregoing was all of the material evidence introduced at said hearing.

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151 Be It Remembered that in the progress of the above entitled cause, and at a hearing on March 17, 1933, before Honorable Charles B. Davis, District Judge, the said cause came on to be heard on the merits thereof, and the following evidence was offered:

Appearances:

For Plaintiff: Fordyce, White, Mayne and Williams, Esqs., by Walter H. Mayne, Esq.

For Defendants, Albert Clement and Guy S. Martin: Carter, Jones & Turney, Esqs., by Richard S. Bull, Esq., and Oliver F. Erbs, Esq.

For Defendant, Walter F. Brown, Ogden L. Mills and Walter O. Woods: George C. Dyer, Esq., Assistant United States Attorney.

Mr. Mayne first called attention of the court to motion filed on behalf of defendants Ogden L. Mills, Secretary of the Treasury, Walter F. Brown, Postmaster General and Walter O. Woods, Treasurer of the United States, to dismiss, on the theory that the court had no jurisdiction over said defendants, and that the service under Rule 57 was improper. Mr. Dyer stated that he was appearing on behalf of said defendants only for the purpose of objecting to the jurisdiction, whereupon the court stated that while the ordinary procedure would be to dismiss as to those defendants the court would carry the motions along with the case and rule on them at the time of its decision.

Plaintiff thereupon offered evidence to sustain the issues in its behalf, and Mr. Mayne first reoffered all of the oral testimony theretofore offered by plaintiff at the time the hearing was had on the order to show cause, and all of plaintiff's exhibits offered at said hearing, being plaintiff's Exhibits A, B, C, D, E, F, G and H.

R. C. HOUCK, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

I live at 2166 Tower Grove Avenue, in St. Louis, an am manager of the Claim Department of the National Surety Company in St. Louis. I am familiar with the matters pertaining to the construction of the Carlinville post office building, and have received claims from labor and material
152 people showing accounts against that building for its construction. I have these claims with me and have made an itemized list of them showing the amounts which the creditors claim to be due after I requested them to furnish verified statements of account. I have received a part of the verified accounts, but not all of them. The verified claims aggregate $16,741.90 and the unverified claims $3,429.49, or a total of $20,171.39.

Plaintiff's Exhibit I.

Plaintiff's Exhibit I, showing the verified claims received and the claims on which verified accounts had not been received, in the amounts above mentioned, was introduced in evidence. Such exhibit is not here set out as it is not deemed to have any materiality to the issues here presented.

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153 I tried to get Mr. Drollenga, the government engineer, to come here to testify, but he refused to appear today. He has informed me that the additional work to which he testified at the last hearing had not been completed by Mr. Tobin.

Cross-Examination.

By Mr. Bull:

The bond premium listed at $742.25 was shown on a bill sent up to me by the office of the National Surety Company. It is correct that office looks to Mr. Martin for that premium and has charged him with it. It is also correct that Mr. Harlow stated the same thing and that he expected payment from Mr. Martin for that premium.

The foregoing was all of the evidence offered on behalf of plaintiff.

Thereupon the defendants Tobin and Martin, to sustain the issues in their behalf, offered the following evidence:

Mr. Bull reoffered all of the evidence heard at the time of the hearing on the order to show cause, including all exhibits offered on behalf of said defendants.

JOHN RABENAU, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of defendants Tobin and Martin as follows:

Direct Examination.

By Mr. Bull:

I am a certified public accountant with an office in the Paul Brown Building under the partnership name of Rabenau and Slais. I have been a certified public accountant since 1921. At Mr. Guy S. Martin's request, I made an audit of his account with A. C. Tobin and prepared a report of that audit. The first report (marked defendant Martin's Exhibit N) covered a check of the Tobin account with Mr. Martin from 1927 to March 15th (1933). In making that audit I followed this investigation and routine: The debits were supported by cancelled checks which were properly endorsed and cleared through the Tower Grove Bank, that is, the checks of Mr. Martin. To substantiate those we checked their deposits in the various bank accounts of Mr. Martin and Mr. Tobin, in other words, we took the cancelled checks of Mr. Mar-
154 tin and checked them into Mr. Tobin's bank accounts. We had statements from Tobin's banks showing items which corresponded to the checks. In the case of Tower Grove Bank we had the monthly statement from that bank submitted to their depositors and in the case of the other banks we had those books. In this first audit, Exhibit N, I took into account what might be considered as assumed bills on the Havana Post Office job. Those statements were substantiated by the various creditors and in addition were verified by telephone with Mr. McFaul of the Maryland Casualty Company and they appear under the item "Accounts payable, unpaid and due—Havana, Ill. contract." There are five of those items.

After making this audit I computed the interest on the account which amounted to $352.84 at the rate of 6% on monthly balances. The net result of the account based on this audit was a showing that Mr. Tobin owed Mr. Martin $1,482.40, brought down to March 15th (1933), and including the credit entry to Mr. Tobin of $10,448.10, representing the government check based on the December and January estimates on the Carlinville job.

The report and audit marked Defendant Martin's Exhibit O began with the account in about April, 1932. There is nothing included therein on anything excepting the Carlinville contract. It includes all entries between Mr. Martin and Mr. Tobin from about April, 1932 up until February 7 (1933) except the first entry is a bond premium item of $742.50 as of February 13, 1932. The various items in Exhibit O were checked and verified by me in the same manner that I testified to with reference to the other exhibit. The net result of that audit was a showing that Mr. Martin owes Mr. Tobin $42.45, and this audit also includes the item for the government check.

Defendant Martin's Exhibits N and O were here introduced in evidence.

155 (Deft. Martin's Exhibit "N".)

March 16, 1933.

To Whom It May Concern:

Pursuant to engagement, we have examined the records of Mr. Guy S. Martin relative to the account of A. Clement Tobin and Co., and submit herewith appended schedule of same, which shows a net debit of $1,482.40 due Mr. Martin.

All cash transactions were thoroughly investigated. Items carried under description of "Cheque" represented advances made by Mr. Martin to A. Clement Tobin and Co., and were deposited by them to their credit in the respective banks named, as evidenced by bank statements and pass books of A. Clement Tobin and Co.

Items marked "*" represented cheques cleared by Mr. Martin for A. Clement Tobin and Co, by Mr. Martin's depository, as evidenced by carbon copies of authorization to the Tower Grove Bank and Trust Co., and further by telephone conversation with the bank.

Items included in Accounts Payable represent items guaranteed by Mr. Martin on the Havana, Illinois Post Office contract and were verified by inspection of invoices and by the Maryland Casualty Co.

Respectfully submitted,

RABENAU AND SLAIS,
Certified Public Accountants,
By John Rabenau.

156 Analysis of A. Clement Tobin and Company Account
Guy S. Martin

		Dr.	Cr.	Balance
1927				
July 10,	Contractors' Insurance	$ 175 00	$	$ 175.00
1929				
Apr. 22,	Loan	50 00		225 00
1931				
Sept. 1,	Bond—Post Office—Havana, Ill.	705 00		930 00
12,	U. S. 330910—Deposit—Compensation	100 00		
	L. C. 30417—Deposit—Public Liability	12 00		1 042 00
Oct. 15,	Cheque (Mason County Bank)	600 00		
26,	Contractors' Contingent Liability	24 00		
30,	Bond—Wensel Andres	21 00		1 687 00
Nov. 2,	Bond—Freight Charges	5 00		
4,	Cheque (Mason County Bank)	300 00		1 992 00
1932				
Jan. 12,	Cheque—On Account		1 000 00	
19,	Cheque Returned	1 000 00		
20,	U. S. 330910—Audit 9/12/31—12/12/31	63 35		
	L. C. 30417—Audit 9/12/31—12/12/31	12 82		
23,	Cheque (Tower Grove Bank and Trust Co.)	500 00		
29,	Cheque (Tower Grove Bank and Trust Co.)	300.00		2 868 17
Feb. 19,	Bond—Carlinville Post Office	742 50		3 610 67
Mar. 28,	U. S. 330910—Audit—12/12/31—3/12/32	36 11		
	L. C. 30417—Audit 12/12/31—3/12/32	3 56		3 650 34
Apr. 2,	Cheque (Tower Grove Bank and Trust Co.)	300 00		
8,	Cheque (Tower Grove Bank and Trust Co.)	200 00		4 150 34
May 5,	Cheque (Banking House of C. H. C. Anderson)	150 00		
21,	Cheque (Tower Grove Bank and Trust Co.)	400 00		4 700 34
	Balance Carried Forward			4 700 34

157		Dr.	Cr.	Balance
	Balance Brought Forward			$4 700 34
1932				
June 21,	Peoria Builders Supply Co.	$ 67 68*	$	
22,	Cheque—Havana, Ill. Post Office		7 704.00	
23,	Cheque (Tower Grove Bank & Trust Co.)	1 500 00		

		Industrial Art Relief Co.	45 00*		
		Hunkins-Willis Lime and Cement Co.	6 40*		
		St. Louis Asphalt Co.	24 30*		
	24,	Peoria Stone and Marble Works	2 000 00*		
		Riverside Caulking Co.	28 52*		
		St. Louis Material and Supply Co.	28 52*		
		Wensel Andres	135 40*		
	25,	Edgar Boggs	52 50*		
		W. W. Spink	250 00*		
		P. Neteler	51 00*		
	27,	Zempel's Hardware Store	136 59*		
		Zellmer Studio	28.50*		
		Havana Mfg. Co.	41 16*		
	30,	Cheque (Tower Grove Bank & Trust Co.)	450 00		
		Telephone Calls to Havana (1931)	1 95		1 838 86
July	1,	B. S. Beenemann	69 00*		
		J. H. Johnson	75 40*		
		Central Illinois Public Service Co.	12 05*		
		Middle States Telephone Co.	16 45*		
		Harry C. Diseman	75*		
		Archer Miller	21 68*		
		Illinois Independent Oil Co.	1 62*		
		La Crosse Lumber Co.	379 36*		
		R. Gregory & Co.	1 200 00*		
		Alexander Henderson	250 00*		
		Western Union Telegraph Co.	15 10*		
		Lon Yost	2 50*		
	2,	Heine Battery Co.	1 25*		
	6,	Leo S. Borgelt	288 87*		
	7,	Cold Springs Granite Co.	283 36*		
		C. H. Kreiling	10 00*		
		Telegram	42		
		Riot Bond—Carlinville Post Office—$70 Home Insurance Co.	9 00		
		Harry Sandman	165 00*		
	29,	Cheque (Tower Grove Bank and Trust Co.)	600 00		5 220 67
Aug.	8,	Cheque (Tower Grove Bank and Trust Co.)	200 00		
	12,	U. S. 330910—Audit—3/12/32—6/12/32	76 49		
		L. C. 30417—Audit—3/12/32—6/12/32	15 37		
	18,	Cheque (Tower Grove Bank and Trust Co.)	115 00		
		Cheque—On Account		115 00	
	19,	Cheque Returned	115 00		
	26,	Cheque Redeposited		115 00	5 512 53
		Balance Carried Forward			5 512 53

158			Dr.	Cr.	Balance
		Balance Brought Forward			$5 512 53
	1932				
	Sept. 3,	Cheque (Carlinville National Bank)	$ 725 00	$	
	6,	Telegram to Carlinville	30		
	30,	Additional Endorsements—#70 Home Insurance Co.	18 39		6 256 22
	Oct. 11,	Bond—Freight Charges	5 00		
	12,	Cheque (Tower Grove Bank and Trust Co.)	600 00		
	14,	Cheque—On Account		600 00	
	15,	Cheque Returned	600 00		
	26,	Contractors' Contingent Liability—Bond	24 00		
	31,	Cheque (Tower Grove Bank and Trust Co.)	300 00		
		Cheque—Redeposited		600 00	
		Cheque Returned	600 00		7 185 22
	Nov. 2,	Additional Endorsement—#70 Home Insurance Co.	3 06		
	5,	Cheque (Tower Grove Bank and Trust Co.)	300 00		
	9,	Cheque (Tower Grove Bank and Trust Co.)	350 00		
	14,	Cheque—Havana, Ill. Post Office		5 258 00	
	15,	U. S. 370551—Deposit—Compensation	200 00		
		L. C. 39583—Deposit—Public Liability	12 00		
	16,	Cheque (Tower Grove Bank and Trust Co.)	75 00		
	19,	Cheque (First National Bank in St. Louis)	700 00		3 567 28
	Dec. 1,	Telephone—Alton, Ill.	25		
	3,	Telephone—Alton, Ill.	40		
	7,	Cheque (Tower Grove Bank and Trust Co.)	500 00		
	10,	Cheque (Tower Grove Bank and Trust Co.)	300 00		4 367 93
	1933				
	Jan. 6,	Cheque (Tower Grove Bank and Trust Co.)	700 00		
	10,	Cheque (Tower Grove Bank and Trust Co.)	300 00		
	16,	Telegram—Carlinville, Ill.	30		
		Telephone—Alton, Ill.	25		
	21,	Cheque (Tower Grove Bank and Trust Co.)	100 00		
	26,	Cheque (Tower Grove Bank and Trust Co.)	50 00		
	31,	Cash—Advance	10 00		5 598 48
		Balance Carried Forward			5 598 48

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		Dr.	Cr.	Balance
	Balance Brought Forward			$5 888 48
1933				
Feb. 6,	Expenses—Trip to Washington, D. C.	$ 122 34	$	
7,	Proceeds—December and January Estimates—Carlinville Post Office		10 448 10	
10,	Cash—Advance	5 00		
11,	Cash—Advance	2 00		
13,	Cash—Advance	2 00		
15,	Cash—Advance	4 00		
18,	Cash—Advance	4 00		
21,	Cash—Advance	1 00		
22,	Cash—Advance	5 00		
23,	Cash—Advance	5 00		4 709 28
Mar. 15,	Accounts Payable Unpaid and Due—Havana, Ill. Contract			
	Huttig Sash and Door Co.	1 064 80		
	R. Gregory and Co.	1 608 46		
	Peoria Stone and Marble Works	1 060 00		
	Alexander King and Co.	421 08		
	Illinois Steel Bridge Co.	1 694 50		
	Interest on Open Account to Feb. 1, 1933	352 84		$1 482 40

* Items marked thus represent cheques signed, "A. Clement Tobin and Co., by A. Clement Tobin," but charged to the account of Guy S. Martin by the Tower Grove Bank and Trust Co.

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160 (Deft. Martin's Exhibit "O".)

March 16, 1933.

To Whom It May Concern:

Pursuant to engagement, we have examined the records of Mr. Guy S. Martin relative to the Carlinville, Illinois Post Office account of A. Clement Tobin and Co., and submit herewith the appended schedule of same, which shows a net credit of $42.45 due A. Clement Tobin and Co.

All cash transactions were thoroughly investigated. Items carried under description of "Cheque" represented advances made by Mr. Martin to A. Clement Tobin and Co., and were deposited by them to their credit in the respective banks named, as evidenced by bank statements and pass books of A. Clement Tobin and Co.

Respectfully submitted,

RABENAU AND SLAIS,
Certified Public Accountants,
By John Rabenau.

161 Analysis of A. Clement Tobin and Company Account
Carlinville, Illinois, Post Office
Guy S. Martin

		Dr.	Cr.	Balance
1932				
Feb. 19,	Bond—Carlinville Post Office	$ 742 50	$	$
Apr. 2,	Cheque (Tower Grove Bank and Trust Co.)	300 00		
8,	Cheque (Tower Grove Bank and Trust Co.)	200 00		1 242 50
May 5,	Cheque (Banking House of C. H. C. Anderson)	150 00		
21,	Cheque (Tower Grove Bank and Trust Co.)	400 00		1 792 50
June 23,	Cheque (Tower Grove Bank and Trust Co.)	1 500 00		
30,	Cheque (Tower Grove Bank and Trust Co.)	450 00		3 742 50
July 8,	Riot Bond—#70 Home Insurance Co.	9 00		
11,	Cheque (Tower Grove Bank and Trust Co.)	600 00		
29,	Harry Sandman	165 00		4 516 50
Aug. 8,	Cheque (Tower Grove Bank and Trust Co.)	200 00		
13,	Cheque (Tower Grove Bank and Trust Co.)	115 00		
13,	Cheque—On Account		115 00	
19,	Cheque Returned	115 00		
26,	Cheque Redeposited		115 00	4 716 50
Sept. 3,	Cheque (Carlinville National Bank)	725 00		
6,	Telegram—Carlinville, Ill.	30		
30,	Additional Endorsements—#70 Home Insurance Co.	18 39		5 460 19
Oct. 11,	Bond—Freight Charge	5 00		
12,	Cheque (Tower Grove Bank and Trust Co.)	600 00		
14,	Cheque—On Account		600 00	
15,	Cheque Returned	600 00		
26,	Contractors' Contingent Liability Bond	24 00		
31,	Cheque Redeposited		600 00	
	Cheque Returned	600 00		
	Cheque (Tower Grove Bank and Trust Co.)	300 00		6 389 19
	Balance Carried Forward			6 389 19

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	Dr.	Cr.	Balance
Balance Brought Forward			$6 389 19
1932			
Nov. 2, Additional Endorsement—#70 Home Insurance Co.	$ 3 06	$	

	5,	Cheque (Tower Grove Bank and Trust Co.)	300 00			
	9,	Cheque (Tower Grove Bank and Trust Co.)	350 00			
	15,	U. S. 370551—Deposit—Compensation	200 00			
		L. C. 39583—Deposit—Public Liability	12 00			
	16,	Cheque (Tower Grove Bank and Trust Co.)	75 00			
	19,	Cheque (Tower Grove Bank and Trust Co.)	700 00		8 029	25
Dec.	1,	Telephone—Alton, Ill.	25			
	3,	Telephone—Alton, Ill.	40			
	7,	Cheque (Tower Grove Bank and Trust Co.)	500 00			
	10,	Cheque (Tower Grove Bank and Trust Co.)	300 00		8 829	90
1933						
Jan.	6,	Cheque (Tower Grove Bank and Trust Co.)	700 00			
	10,	Cheque (Tower Grove Bank and Trust Co.)	300 00			
	16,	Telegram—Carlinville, Ill.	30			
		Telegram—Alton, Ill.	25			
	21,	Cheque (Tower Grove Bank and Trust Co.)	160 00			
	26,	Cheque (Tower Grove Bank and Trust Co.)	50 00			
	31,	Cash—Advance	10 00		10 050	45
Feb.	6,	Expenses—Trip to Washington, D. C.	122 34			
	7,	Proceeds—December and January Estimates—Carlinville Post Office		10 448 10		
		Interest on Open Account to Feb. 1, 1933	232 86		8	42 45

163 Cross-Examination.

By Mr. Mayne:

I was employed by Mr. Martin to make this audit. The items included in Exhibit N representing accounts payable and guaranteed by Mr. Martin on the Havana Post Office contract was verified by information received both from Mr. McFaul and Mr. Martin. I took Mr. Martin's ledger account and verified the items by taking the cancelled checks. As to the first two items, the one for $175.00 for insurance and the one for $50.00, which I understood to be a cash loan to Mr. Tobin, I merely took Mr. Martin's word for those. As to the item of $705.00 for the Havana, Ill. Post Office bond, I

don't know whether Mr. Martin actually paid out that sum or not. The only way I could have verified that was by detailed audit of Mr. Martin's books that probably would have taken weeks. I did not call the surety company to see whether they actually got that $705.00 but Mr. Martin's insurance records show that Mr. Tobin was charged with that. It is down to the third item that we did not check as to whether Mr. Martin had paid the items or not. The same thing would hold true of the next two items. As to the $600.00 item I saw the check which was duly endorsed and was deposited in the Mason County Bank to the credit of Mr. Tobin, as shown by the pass book which is substantial evidence it went to Mr. Tobin from Mr. Martin. It could not have been on the Carlinville job, because that was before the Carlinville job was started. As to the other bond items of $24.00, $21.00 and $5.00 Mr. Tobin probably can verify those more substantially than I have. As to the money that was advanced to Mr. Tobin I do not know what the money was used for, but I know that it went into the particular banks which we have designated. We did not trace this money out of Mr. Tobin's account as that was not within the scope of our audit. All I am trying to show is what Mr. Martin advanced to Mr. Tobin. As to what Mr. Tobin did with the money I don't know, but I might say that we have cancelled checks of Mr. Tobin which are duly signed and are to various individuals and contracting and supply companies which cover approximately the amount shown. As to the statement in the audit shown as Martin's Exhibit O that we had examined the records of Mr. Guy Martin relative to the Carlinville Post Office account, I may explain that Mr.

164 Martin does not designate any of his accounts that way. I say there that it is relative to the Carlinville account because the checks were written after the date of that contract and Mr. Tobin's records here show, that they were in payment on that contract, and loosely because that was the job that he was working on at that time, and in addition conversation with the Tower Grove Bank partly substantiated it.

As to the checks on the Tower Grove Bank between the dates of February 19th and July 11th I saw those checks and verified them with the bank account. I don't know what Mr. Tobin did with the money; I did not made an audit of Mr. Tobin's books. As to the item of February 6, 1933 for expenses of Mr. Martin in trip to Washington, $122.34, that was based on what Mr. Martin told me, and I know that he went to Washington. The $1,000.00 interest charge shown on Mr. Martin's ledger sheets I did not attempt to verify.

I could put the correct amount in without verifying his amount.

GUY S. MARTIN, a defendant, of lawful age, being duly produced, sworn and examined, testified in his own behalf as follows:

Direct Examination.

By Mr. Bull:

At the hearing on the order to show cause I identified certain exhibits consisting of ledger sheets and other documentary evidence of my account with Mr. Tobin. I am familiar with the two audit reports that have been made in the last several days, but did not examine them very carefully. In connection with the amount shown in my amended return in this case as owing from me to Mr. Tobin, of about $1,280.00, I may say that since that return I went over my checks and books and found items as to which I was mistaken at the time of the other hearing. I found items which I did not have at the time of my other testimony consisting of original bills outstanding on the Havana job which I had guaranteed, amounting to about $2,200.00 over the figure included in the statement previously submitted and which had been given to me by Mr. Tobin. One item which differs at this time is the $600.00 check which had been returned to the bank and which had not been charged to Mr. Tobin, so that there is a total of about $2,800.00 difference between the figures I arrived at at the time of my return and at the time of my later investi-
165 gation. At the time of the other hearing I had not computed my account from April, 1932 up to the present time.

Now taking the charge made by me to Mr. Tobin for contractor's insurance of $175.00, that appears on my ledger sheets. It is the one item on July 10, 1927 that was paid by me for Mr. Tobin. The loan of $50.00 in 1929 was made by me to Mr. Tobin. I am not sure whether that was a check or a cash advance. The item of $705.00 in September, 1931 for premium on bond for Post Office at Havana, Illinois, was paid by me as was the $100.00 item also in September, 1931, which was a deposit premium for compensation policy. The same applies to the $12.00 item for public liability insurance premium. The item of $122.34 for expenses for trip to Washington covered my trip for the purpose of securing payment of the December and January estimates on the Carlinville job.

Cross-Examination.

By Mr. Mayne:

I might have collected the money from Washington by mail. The reason I went to Washington was that I had an assignment from Mr. Tobin of this money and I wanted to collect it. I had considerable money involved in this thing. That assignment was simply a power of attorney which I had on file. That power of attorney gave me the right to collect the money. It was the understanding between Mr. Tobin and me that the power of attorney was given to pay me; there was no other writing or agreement with Mr. Tobin concerning the disbursements of this money after I received it.

According to the audit made on the Carlinville job alone and taking into account the $10,448.10 I received I owe Mr. Tobin $42.45. There is no discrepancy between that and the other audit which includes the Havana job and which shows that he owes me $1,482.40, for in that account we charge him with items for which I am responsible and which are now outstanding on the Havana job of about $5,800.00, and for which we credit him with an estimate received on the Havana job of $5258.00.

The foregoing was all of the evidence offered on behalf of defendants at the said hearing.

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166 Be It Remembered that during the September Term, A. D. 1934, on October 18, 1934, at a hearing before Honorable Charles B. Davis, District Judge, upon the claims of the various claimants as well as exceptions thereto, the following evidence bearing upon the claim of Guy S. Martin was offered:

Appearances:

For Plaintiff—Messrs. Fordyce, White, Mayne and Williams, by Mr. Walter H. Mayne.

For Claimant Guy S. Martin—Messrs. Carter & Jones, by Mr. Richard H. Bull.

For Defendant Albert Clement Tobin—Mr. Alfred Strobans.

For Claimants Jack L. Hyde, James Beveridge, Alton Brick Co., Usona Mfg. Co., Carl Koerner, Wenzil Andris and Mississippi Lime and Cement Co.—Mr. Otto F. Fickeissen.

For Claimant Galloway Von Gruenigen Plumbing & Heating Company—Mr. J. H. Cunningham, Jr.

For Claimants Edward Tobin, Sr., and Central Architectural Iron Works—Mr. David K. Breed.

And there also appeared various other counsel representing the various other claimants.

Mr. Bull, on behalf of defendant and claimant, Guy S. Martin, stated that he would like to make formal objection to the proceedings, and point out to the court that the exceptions filed on behalf of said defendant and claimant go to the consideration of any of the claims, and that his position took
two phases, first, his objection to the proceeding and
167 the exceptions to the allowance or consideration by
the court of the various claims, and, second, his claim in the event the objection and exceptions are overruled. Objection was then formally entered on behalf of defendant Martin to the court hearing or determining or considering the allowance of the various claims that had been filed in the proceeding, on the ground that under the pleadings and by the nature of the proceeding, the court had no authority and lacked jurisdiction to administer the fund in the manner which appeared to be contemplated. In conjunction with such objection the document that was filed at the time defendant Martin filed his claim, and which was captioned "Exceptions, and in the Event they are Overruled, Proof of Claim of Guy S. Martin" was submitted, it being further stated that defendant Martin's contentions and his position were submitted to the court on the amended bill of the plaintiff in the case on which the cause was originally tried, on defendant Martin's return and answer on the order which brought the fund into court and held it subject to further orders of the court, and on the evidence that was heard at the original hearings. It was suggested that a ruling by the court at that time on such objections would be required unless the court preferred to take them with the case to be ruled upon later.

The Court thereupon stated that he would rule now, and asked whether anyone wished to be heard on the matter. Whereupon Mr. Fickeissen, speaking on behalf of all of the creditors and claimants in this cause, other than defendant, Guy S. Martin, made a motion that the Court then strike from the files the claim filed by Guy S. Martin in this proceeding upon the grounds that all of the matters attempted to be determined by Guy S. Martin's claim as now filed were previously adjudicated by the Court; that in May of 1933 a decree was entered in this cause by the terms of which Guy S. Martin was required to pay into Court the sum of $10,448,

which he had collected from the U. S. Government on
168 account of the contract of A. C. Tobin, for the erection of this Carlinville, Illinois Post Office building; that such decree purports to be a final decree and was believed to have made permanent a prior temporary injunction against Martin and against A. C. Tobin claiming the funds from this Carlinville job; that Guy S. Martin was required to pay those funds into Court for the benefit of those who might be entitled to them, and at that time the Court had before it the question as to the right and title of Guy S. Martin in and to said funds; that if Guy S. Martin had been entitled to such monies or any portion thereof, presumably the decree would not have been entered requiring him to pay that sum of money into the Registry of the Court, and since that matter has been adjudicated and he has been required to pay those funds into Court for the benefit of those who might be entitled to them, he cannot be heard again on that subject, as he has had his day in Court and the Court has already decreed that he had no title to the funds; that neither his claim nor his exceptions have any place in the files of this Court and should be stricken from the files; that said exceptions of Guy S. Martin should be stricken from the files for the further reason that they are so general as to be meaningless. The Court overruled the motions of the other claimants to strike Guy S. Martin's claim from the files and to strike Guy S. Martin's exceptions from the files and exception was reserved to the action of the Court.

Thereupon Mr. Bull, Attorney for Guy S. Martin, stated that he had felt right along that the creditors and claimants have misconceived the nature of the previous Court order, and that it was not the purpose of said Court order to bring the funds into Court for the benefit of the creditors and claimants, but to merely restrain Guy S. Martin from getting any further money in a matter to which there was no contest, to which Guy S. Martin was agreeable. That paragraph
169 3 of the decree really determined the nature of the proceedings in his opinion, and that in paragraph 5 the Court reserved the right to enter further orders and decrees; that the original bill and the amended bill was not to bring a fund into Court for the benefit of the creditors, but to bring it into Court for the benefit of the plaintiff, National Surety Company, and make it subject to whatever rights that surety might have; that in his opinion the entry of the decree did not make the matter res adjudicata as far as Guy S. Martin is concerned, as there was no order disposing of the fund or determining his final rights from which he could appeal; that for that reason the fund has remained here, Guy S. Martin

abided by the orders of the Court, but that the fund is held here subject to the orders of the Court and there has been no final order, no appealable order or decree entered. Thereupon Mr. Strobans, Attorney for defendant, A. C. Tobin, stated "Counsel (referring to Mr. Bull) overlooks the fact that since the money was paid into Court the situation has changed materially. The Bonding Company became insolvent and this Court of Chancery was confronted with the situation of having this fund in its hands and it had to do something about it * * * It is simply an insolvency proposition both on the part of the National Surety Company and certainly the plaintiff, Tobin, * * * I think the matter should be settled once for all. Your Honor has the jurisdiction to act in this matter to handle and order the distribution of this fund in the manner that has been outlined if your Honor approves that method, because otherwise the fund will lie here in Court and nobody will derive any benefit from it, and that is a situation I am sure no Court would permit.

170 Thereupon Mr. Mayne, Attorney of Record for the National Surety Company stated in open Court:

"Mr. Mayne: I will probably try to enlighten the Court. What Mr. Bull says, I agree with in this respect: This suit was brought by the National Surety Company, a going concern, to recover money that was diverted wrongfully by the contractor to Guy S. Martin. We brought the suit to protect our interests as surety, and the matter of whether this money was wrongfully diverted from this job to Guy Martin was determined by your Honor and your Honor entered a decree stating that Martin was not entitled to this fund; the fund ought to be turned over to the National Surety Corporation for the benefit of the creditors, who would file claims against the surety on its bond; however, the National Surety Company, in the meantime, went into liquidation. This fund is here in court. Now, there are two ways that these creditors can be protected—either that this fund that is now in court go to the surety company and these creditors file their claims in liquidation, or the Court says that this fund is here, it has an affixed document here marked money that belongs out of this Carlinville job and should be paid by this Court to the creditors who actually put labor and material into this particular job. After the liquidation of the surety company, in order to protect these creditors here in St. Louis, I have fallen in line to assist them in keeping this fund intact, so that they would receive a payment, rather than have it go into the hands of the National Surety Company, and participate with thousands of other creditors against that concern.

I feel now that this is a trust fund for the benefit of these particular labor and material men, and this fund certainly ought to be diverted for that purpose solely, and not go into the hands of the receiver of the National Surety Company, where they would probably participate for very few cents on the dollar, but this fund is here, it is here now, it is the money that was to be used on this particular job, but Martin had it instead of the creditors. Now, that is our position and I think it can be very well said that this proceeding is one in equity and the Court can determine to do justice to all the parties, especially when this fund has been actually brought into court under this particular job.

The Court: Didn't we somewhere down the line file a petition in this case, or amended bill, authorizing this sort of a proceeding?

171 Mr. Mayne: No, your Honor.

The Court: Stipulation—didn't we file a stipulation?

Mr. Mayne: We filed a stipulation with those parties allowing them to come in.

The Court: See if we can find that stipulation.

Mr. Mayne: I don't know whether Martin ever signed that or not.

Mr. Bull: Martin, of course, in his position, has had to object right along and file objections to the procedure.

Mr. Breed: I have a paper here under date of January 24, 1934, this court entered an order fixing the time for filing claims, and the order signed by the Court says: "Now, at this day, this case coming on for hearing upon the petition of plaintiff for an order fixing the time for filing claims herein, and it appearing to the Court that all the parties hereto, except Guy S. Martin, and a majority of the parties having claims for furnishing labor and material, and so forth, have consented thereto, it is ordered that claims be filed." Now, I think that that order, which was made by consent of all the parties present in court, takes the place of a stipulation and is the order which makes this proceeding today proper, and as I understand Mr. Martin's contention, his contention in January was that the order to let the creditors in here was wrong because it was his money, and the Court, in spite of that contention, made the order for filing claims and let the order show on its face that he had not consented to the same, and now he has let nine months go by without taking an appeal therefrom, which certainly was an appealable order, in that it showed that the creditors were entitled to this money

The Court: Well, temporarily, reserving the right to change its ruling, the Court will overrule the motion or the objection of Guy S. Martin to the jurisdiction of the Court to hear this matter.

To which ruling of the Court the defendant Guy S. Martin, by his counsel, then and there at the time duly excepted.

Mr. Bull: And I assume it may be understood that your Honor's ruling goes to the written exceptions and objections, as well as the oral objections to the introduction of evidence or to the procedure here?

172 The Court: Well, I don't understand. You mean that the Court is ruling on Guy S. Martin's claim?

Mr. Bull: No; merely on his exceptions to the consideration of claims which take a written form and have been filed here.

The Court: Yes; well, we will overrule them. Now, call the first one of these claims."

(Thereupon various claims were called, at the conclusion of the hearing of which, the Guy S. Martin claim was called, and the following proceedings were had:)

Mr. Bull then stated that as full evidence was heard at the previous hearings, so far as defendant Martin was concerned, upon the merits of his claim, such claim was to be taken as submitted by the court on the verified claim which was filed, and on the evidence which had theretofore been heard on the occasion of the several hearings, including the exhibits which were filed at that time.

Mr. Fickeissen, on behalf of the claimants other than Guy S. Martin, objected to the introduction of any testimony or evidence in connection with the claim of Guy S. Martin, for the reasons assigned in his motion to strike said claim from the files; which objection was overruled by the Court, and exception duly reserved.

173 Mr. Mayne, on behalf of the National Surety Company, objected to the submission of the Martin claim on the ground that it had already been adjudicated by the court. The court overruled the objection, reserving the right to take that view later on.

Mr. Strobans, on behalf of claimant Albert Clement Tobin, then offered in evidence a report or audit of Schuessler-Keller & Co., certified public accountants, covering the audit of defendant Guy S. Martin which was previously introduced in ev-

idence and marked Defendant Martin's Exhibit N. This report which was attached to the said Exhibits N and O was as follows:

"October 19, 1933.

Mr. Alfred I. Strobans,
1008 Title Guarantee Bldg.,
St. Louis, Mo.

Dear Sir:

Pursuant to your request we have referred to analysis of A. Clement Tobin & Company's account with Guy S. Martin as presented in an audit made by Rabenau & Slais, Certified Public Accountants, and presented by Guy S. Martin as defendant's Exhibit 'N' in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

This audit disclosed a balance due Guy S. Martin of $1,482.40 after having credited the account with $10,448.10 on February 7, 1933. If this credit had not been made, the account would have reflected a credit balance of $11,930.50.

If you will refer to the fourth page of the audit report of Rabenau & Slais you will note the following:

'Mar. 15. Accounts Payable Unpaid and Due—Havana, Ill. Contract.

Huttig Sash and Door Co.	$1,064.80
R. Gregory and Co.	1,608.46
Peoria Stone and Marble Works	1,050.00
Alexander King and Co.	421.08
Illinois Steel Bridge Co.	1,694.50'

You will note that the foregoing accounts total $5,838.84. According to Rabenau & Slais, Certified Public Accountants, Guy S. Martin has not paid these accounts, in the aggregate $5,838.84. He therefore apparently had no right to charge them to the account of A. Clement Tobin & Company, unless he has made provision to pay them. Deducting this $5,838.84 from $11,930.50 leaves an apparent credit balance due Guy S. Martin of $6,091.66.

In the audit report of Rabenau & Slais you will note the following:

'Feb. 19, 1932 Bond—Carlinville Post Office $742.50'

This item apparently has been improperly charged by Guy S. Martin against A. Clement Tobin & Company, inasmuch as

174 on July 21, 1933, the Ancillary Receiver of the National Surety Company addressed to A. C. Tobin a letter stating that they were not releasing A. Clement Tobin & Co. from liability to the Ancillary Receiver for the payment of a premium of $722.50. There is a difference of $20.00 between the premium reflected in the audit and the premium referred to by the Ancillary Receiver. We have been informed that this is merely a typographical error in the letter of National Surety Co.

The letter referred to indicates to us that Guy S. Martin is not entitled to take credit for that item. If this $742.50 is deducted from the credit balance aforementioned we find remaining a credit balance apparently due Guy S. Martin of $5,349.16.

We suggest that you communicate with all insurance companies where charges have been made relative to their arrangements with Mr. Martin.

You will also notice that the audit report of Rabenau & Slais contains the following charge:

"Mar. 15—Interest on Open Account to February 1, 1933 $352.84"

If this charge is deducted we find remaining a credit balance of $4,996.32 apparently due Guy S. Martin from A. Clement Tobin & Co.

There are a number of items that you pointed out that we have no way of verifying at this time, however, if time will permit and you desire us to go into the matter more fully, we shall be pleased to have you call upon us.

Very truly yours,

SCHUESSLER KELLER & CO.

Certified Public Accountants."

In support of the claim of Edward Tobin, Sr., A. Clement Tobin testified in answer to the question of whether he had a silent partner on the Carlinville job that there was an arrangement between himself and Guy S. Martin that if he (Tobin) was short of money he was to draw on Martin and Martin was to help him out from time to time, and if at the conclusion of the job there was a profit that they were to split the profit.

On cross-examination by Mr. Bull on behalf of Martin, the witness stated that he did not think he had said a word to that effect in any of the hearings that were held heretofore and if he didn't he thought the question was never asked him.

A. CLEMENT TOBIN, a witness of lawful age being duly produced, sworn and examined in connection with the claim of Martin, on behalf of the exceptors thereto, testified as follows:

Direct Examination.

By Mr. Fickeissen:

My arrangements with Mr. Martin started back at the beginning of the Havana Post Office job. At that time I was the low bidder and Mr. Martin wrote the bond, and my financial standing was weak. While there was nothing in writing it was agreed that if I needed funds at any time, I could get a lift from Mr. Martin. In return for that, at the completion of the various jobs, the profits were to be divided on a 50/50 basis. That arrangement commenced on the Havana job and carried right on through the Carlinville job. As to whether or not Mr. Martin's attorneys knew of the arrangement, I don't believe that they did. I never told them, and I
175 don't know whether he told them or not. I never had any discussion with any of them about the arrangement that was had with me.

Cross-Examination.

By Mr. Bull:

Besides the arrangement as to dividing of profits it was also understood, as a part of the agreement, that Mr. Martin would get back the money he advanced me. There would be no profit until the money that was advanced would be returned. It was agreed and understood that I would pay back those funds to Mr. Martin, and that after that there was to be a division of the profits. That was my testimony. I don't recall exactly when it was that I first mentioned to anyone this arrangement that I had with Mr. Martin for a division of the profits. I don't think I mentioned it to anyone, aside from Mr. Martin, at least up until the time of the trial of this case and the several hearings we had. Well, I think that I did mention it thereafter, but I don't recall to whom or when. Nothing appeared on my books in the way of evidence of such an agreement. There was no writing, simply a verbal agreement. I think it is true that both my books and Mr. Martin's books reflect these various sums of money that he advanced me.

Redirect Examination.

By Mr. Fickeissen:

Mr. Martin did no work and furnished no materials for the Carlinville Post Office. The claim he is making is for moneys advanced, but the moneys that he advanced went directly into the job. In other words, somebody got that money on the job. As to whether Mr. Martin had anything

to do with my getting the Carlinville job—Mr. Martin is the representative of the National Surety Company, and as attorney in fact signed the performance bond.

176 Q. And was the arrangement that you claim was made with him with respect to the furnishing of money made right at the start of that job?

A. Which job?

Q. The Carlinville job.

A. No; it was made at the start of the Havana job.

Q. At the start of the Havana job?

A. And carried through the Carlinville job.

Q. And when was that arrangement extended to cover the Carlinville job?

A. I don't know as there was ever any particular time that that happened, because we were working both jobs at the same time.

Q. And when the arrangement was first made with respect to the Havana job, was it the understanding that it was to apply to both of those jobs?

177 A. No, because we did not have but the one job at that time.

Q. I see. And when you did get the other job—

A. (Interrupting) It went right on through.

Q. That went right on through?"

Mr. Bull then moved that the last answer be stricken out, because the previous testimony showed that it would be the mere conclusion of the witness as to its going right on through. Such motion was overruled by the Court, to which ruling the defendant, Guy S. Martin, by his counsel, then and there at the time duly excepted.

(The Witness): The letter shown me dated January 11, 1932 was a letter from Guy S. Martin to me.

(This letter, on the stationery of Lon W. Harlow & Company, was marked Exceptor's Exhibit No. 2 and introduced in evidence.)

Exceptor's Exhibit No. 2.

"January 11th, 1932.

A. Clement Tobin & Company,
Havana, Illinois.

Dear Clem:

Your Brother called the other day to tell me that you are the low bidder on the Carlinville Post Office, which was somewhat of a surprise to me. There must be a mistake somewhere, as I thought you had your bid made out at $55,000.00. However, if you acquired any information which would

warrant you in reducing it and know that it is alright, it is O. K. with me, provided we can satisfy the surety company.

Mr. J. W. Gerhardt, a friend of mine from Cape Girardeau, would like very much to meet you in St. Louis, and if you will advise me when you expect to be here, I will arrange to have him meet with all of his dope on the Cape Girardeau Post Office.

With best wishes, I am,

Yours very truly,

GUY S. MARTIN."

(A carbon copy of a letter dated January 15, 1932 was then identified by the witness as a carbon copy of a letter written and mailed in answer to the foregoing, and was marked Exceptor's Exhibit No. 3, and introduced in evidence, over the objection of counsel for defendant
178 Martin on the ground that it had not been shown that defendant Martin received it, and on the further ground that even if received, it would not be binding on him. This objection was overruled by the court, to which ruling the defendant Guy S. Martin, by his counsel, then and there at the time duly excepted.)

Exceptor's Exhibit No. 3.

"January 15, 1932.

Mr. Guy S. Martin,
104 North Fourth St.,
St. Louis, Missouri.

Dear Guy:

Received your letter January 11th, indirectly through Mr. J. W. Garhart, with whom we have already advised that we will be pleased to meet him Monday of this next week to consider the Post Office at Cape Girardeau, Mo.

In reference to the Carlinville, Illinois, Post Office on which we had a base bid of $55,000.00, wish to advise that the reduction of $5500.00 was justified and based upon reliability and competent sub-bids. There is no question in my mind, but what the surety can be amply satisfied. There were 12 bidders, the highest of which was $74,000.00, however, 8 of the 12 were in the range of $51,000. to $58,000.00. Our nearest competitor James McHugh & Son of Chicago had a bid of $51,000.00 and some hundred dollars. We have checked our figures and at the present time, we are amply and sufficiently satisfied with the quotation, which we made.

However, we anticipate seeing you Monday at which time we will go into the matter more thoroughly.

Very truly yours,

A. CLEMENT TOBIN & CO."

Cross-Examination.

By Mr. Mayne:

Q. Just one question I want to ask the witness. You testified Mr. Martin was to advance you money on the job as you needed it then on the Carlinville Post Office job?

179 A. I was to be able to get a lift, sure, as I needed it.

Q. Was that for the purpose of paying material men and labor on the Carlinville Post Office job?

A. What money I got from Mr. Martin was to go into the job.

Q. Then you said he was to be repaid at the end?

A. Sure.

Q. Was he to be repaid after you had first paid all of your laborers and material men?

A. That, naturally that would ensue.

Further Cross-Examination.

By Mr. Bull:

As to these letters that were exchanged it was a fact that at that time it was proposed that Mr. Martin obtain for me the bond for this contract. That was contemporaneous with the letters; that is what these letters referred to. The money that came from Martin went right back into the job.

DAVID K. BREED, a witness of lawful age, being duly produced, sworn and examined, testified on direct examination by Mr. Fickeissen that he was an attorney and was acquainted with defendant Guy S. Martin, and that he was present at the time the deposition of Mr. Martin was taken in the case of Maryland Casualty Company against Guy S. Martin, Trustee, and Albert Clement Tobin, on March 31, 1934, and that he had a transcript of the testimony that was given by Guy S. Martin at that time, and had gone over that transcript to determine whether or not it correctly set forth Guy S. Martin's testimony, and that this document which the witness held in his hand was the transcript of said deposition. Said transcript, which was a carbon copy of Guy S. Martin's deposition in the Maryland Casualty Company case, was then

marked Exceptor's Exhibit No. 4. The witness then
180 stated:

"I would like to examine a copy of the document (deposition) for the purpose of refreshing my recollection on matters said in my presence and which I remember * * *"

Mr. Bull, Attorney for Guy S. Martin, then admitted that Mr. Martin had testified in said deposition that with respect to the kind of dealings he had had with Tobin on the Post Office job at Havana, Illinois, he (Martin) had loaned Tobin some money at various times; that he did not know how much but several thousand dollars altogether; that he (Martin) would let Tobin have some money, get some back, and let him have some more. Mr. Bull objected to the relevancy and materiality of such evidence, and the Court overruled the objection, and the exception was duly reserved.

The witness Breed was then asked this question by Mr. Fickeissen:

"Q. I will ask you, Mr. Breed, whether the claimant Guy S. Martin further testified at the taking of this deposition as follows: 'Now, I will ask you why you included in your claim in the National Surety Company case the item of $5672 to cover bills on the Havana job?

A. I wanted to see them paid.' Was he asked that question and gave that answer? A. Yes."

The question and answer in said deposition of Guy S. Martin immediately following the one referred to above was then read in evidence and is as follows:

"Q. Is that the only explanation you have on that?

A. At that time, I don't know, because I had not had my books checked up. I did not know that I had paid out on the Havana job the entire $12,962 I had collected on it. Subsequently I discovered that I had paid more than that.

Q. And for that reason you claim $5,672 against the Carlinville job? A. Yes, sir."

Mr. Bull objected to such evidence on the grounds that it was irrelevant and immaterial and that it was not impeaching testimony, which objection was overruled, and the exception duly reserved.

GUY S. MARTIN, a witness of lawful age, being duly produced, sworn and examined, testified on his own behalf in rebuttal, as follows.

181 Direct Examination.

By Mr. Bull:

Neither prior to what has been designated as the Havana job that was handled by Mr. Albert Clement Tobin, nor at any other time, did I ever enter into any agreement or arrangement with Mr. Tobin to the effect that he and I would share 50/50 on the profits in the Havana job, and I had no such agreement or arrangement with reference to any other contract that Mr. Tobin entered into at any time. As to the bond that was supplied by Mr. Tobin on the Havana job, I talked to my bank and they handled it, recommending Mr. Tobin. I had handled other insurance and bonding matters for Mr. Tobin on the Havana and Carlinville Post Office jobs.

Cross-Examination.

By Mr. Breed:

182 At the time I furnished money to Mr. Tobin I had no particular arrangement with him except, of course, that I would get my money back with interest on it. I have been engaged in the insurance business for quite a long while and have sort of specialized in writing construction bonds, and have written bonds for other contractors. I furnished money to Prendergast Construction Company on public work, and that was guaranteed by the Maryland Casualty Company. I have no connection with Lund and Saeger on road jobs in Illinois, except that I was appointed as trustee to serve with Mr. McFaul, an attorney for the Maryland Casualty Company, to work out their jobs after Lund and Saeger had failed. My duties as trustee were to get the jobs completed and to pay the bills. I furnished no money to Lund and Saeger to operate that job while it was proceeding. I have had no connection with jobs handled by E. C. Robinson Construction Company, which I don't know, or by Indiana Engineering and Bridge Company. Jobs which I have written bonds or had something to do with include the E. S. Powers Construction Company. My connection with the Bronx Construction Company was to loan it money while their job was proceeding. It was a sewer contract, and that company eventually went into receivership and then into bankruptcy. I had no arrangement with that company as to services to them except that I was to receive interest on the money that I had loaned. I don't believe that we agreed upon any rate of interest in connection with the Tobin jobs for which I was furnishing money. I obtained a power of attorney from Tobin on his Havana job to collect money due from the government.

Redirect Examination.

By Mr. Bull:

I recall signing and sending the letter marked Exceptor's Exhibit No. 2. I don't recall having received the original of the letter marked Exceptor's Exhibit No. 3, but I probably did. The circumstances were that I had supplied Mr. Tobin with a bid bond, and I was inquiring about his bid. It was after I heard the bid was reduced that I wrote that letter, or rather, it was after I heard he was the successful bidder on the job at a lower figure than he told me he intended to bid.

This was all of the material evidence offered at the
183 hearing on the Martin claim.

The above and foregoing is all the material evidence introduced at the several hearings in said cause.

(Prayer of Guy S. Martin for Approval of Narrative Statement of Evidence.)

Wherefore, Guy S. Martin, defendant and appellant, prays that the above statement of evidence be settled, approved and allowed by the above entitled court as a true, full, correct and complete statement of all the evidence taken and given on the trial of said cause, for use on the appeal taken to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated October 26th, 1935.

RICHARD S. BULL & OLIVER F. ERBS,
Attorneys for Guy S. Martin, Defendant and Appellant.

Carter & Jones,
Of Counsel.

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184 Order Approving Narrative Statement of Evidence.

(Filed November 30, 1935.)

It appearing to the court that the defendant, Guy S. Martin, has heretofore, to-wit, on the 26th day of October, 1935, lodged with the Clerk of this court a proposed narrative statement of the evidence for the appeal in the above entitled cause, and it appearing that said defendant has duly served the appellees in said cause or their attorneys with notice that such narrative statement of evidence was so lodged, and that the court would be asked to approve the

said statement on the 15th day of November, 1935, or as soon thereafter as counsel could be heard, and it appearing that said narrative statement of the evidence is true, complete and properly prepared, the court does now hereby approve said narrative statement of evidence, and orders it filed in the Clerk's office to become a part of the record for the purposes of said appeal.

Dated November 30, 1935.

CHARLES B. DAVIS,
United States District Judge.

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185 Clerk's Certificate.

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri.—ss.

I, Jas. J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri Do Hereby Certify the above and foregoing to be a full, true and complete transcript (except insofar as the same is restricted by the praecipe for transcript heretofore set out) of the record and proceedings in cause No. 10270 In Equity, wherein National Surety Company, a corporation, is plaintiff and Albert Clement Tobin, etc. et al., are defendants, as fully as the same remains on file and of record in my office and that the original citation is hereto attached and returned herewith.

Seal
U. S. Dist. Court
East. Div. of the
East. Jud. Dist. of
Missouri.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at office in the City of St. Louis, in said Division of said District, this 11th day of December, in the year of Our Lord, Nineteen Hundred and Thirty-five.

JAS. J. O'CONNOR,
Clerk of said Court.
By George J. Brennan,
Deputy Clerk.

Filed Dec. 13, 1935, E. E. Koch, Clerk.

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146 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

Guy S. Martin, Appellant,
No. 10536. vs.
National Surety Company, et al.

The Clerk will enter our appearance as Counsel for the Appellant.

RICHARD S. BULL,
OLIVER F. ERBS,
418 Olive St.,
St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 13, 1935.

(Appearance of Mr. R. J. Monroe as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

MONROE & ALLEN,
R. J. MONROE,
Business Address: 502 Millikin Building,
Decatur, Illinois.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

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147 (Appearance of Mr. Arthur E. Kammerer and Mr. Leo Rassieur, Jr., as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

ARTHUR E. KAMMERER and
LEO RASSIEUR, JR.,
copartners doing business as Rassieur, Kammerer & Rassieur.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

(Appearance of Mr. James E. Carroll and Mr. Russell H. Doerner as Counsel for Appellees, Illinois Steel Bridge Co.)

The Clerk will enter my appearance as Counsel for the Appellees, Illinois Steel Bridge Co.

JAMES E. CARROLL &
RUSSELL H. DOERNER,
of Igoe, Carroll, Higgs & Keefe,
Boatmen's Bank Bldg.,
St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

(Appearance of Mr. James E. King as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for one of the Appellees.

JAMES E. KING,
1426 Boatmen's Bank Bldg.,
St. Louis, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

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148 (Appearance of Mr. William T. Keil as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

WM. T. KEIL.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

(Appearance of Mr. Earl Susman and Mr. E. W. Banister as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

EARL SUSMAN,
E. W. BANISTER,
1508 Paul Brown Bldg.,
St. Louis, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

(Appearance of Mr. J. H. Cunningham, Jr., as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

J. H. CUNNINGHAM, JR.,
1930 Boatmen's Bank Bldg.,
St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

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149 (Appearance of Mr. Herbert F. Hahn as Counsel for Appellee Philip Carey Co.)

The Clerk will enter my appearance as Counsel for the Appellees Philip Carey Co.

HERBERT F. HAHN,
1531 Washington Ave.,
St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

(Appearance of Mr. Oliver Blackinton as Counsel for Appellee Brass & Copper Sales Co.)

The Clerk will enter my appearance as Counsel for the Appellees, Brass & Copper Sales Co.

OLIVER BLACKINTON,
914 International Office Bldg., St. Louis.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

(Appearance of Mr. Frank A. Zeis as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

FRANK A. ZEIS,
525 Title Guaranty Bldg.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

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150 (Appearance of Mr. Alvin G. Whitehouse as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

ALVIN G. WHITEHOUSE,
Gillespie, Illinois.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

(Appearance of Mr. Otto O. Fickeissen as Counsel for Appellees.)

The Clerk will enter my appearance as one of Counsel for the Appellees.

OTTO O. FICKEISSEN.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

(Appearance of Mr. E. H. Schwarzenbach as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

E. H. SCHWARZENBACH.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

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151 (Appearance of Mr. Bernard Greensfelder as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

BERNARD GREENSFELDER,
Attorney for Hunkins-Willis
Lime and Cement Company,
705 Olive Street,
St. Louis, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1936.

(Appearance of Mr. David K. Breed as Counsel for Appellees, Central Architectural Iron Works.)

The Clerk will enter my appearance as Counsel for the Appellees, Central Architectural Iron Works.

DAVID K. BREED,
1258 Telephone Building,
St. Louis, Missouri,
Attorney for the Central Architectural Iron Works.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 15, 1936.

(Appearance of Mr. Kenneth Teasdale as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

KENNETH TEASDALE,
Counsel for Appellee, St. Louis Asphalt Company.

152 (Endorsed: Filed in U. S. Circuit Court of Appeals, Feb. 17, 1936.

(Appearance of Mr. Felix Cornitius as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

FELIX CORNITIUS,
Atty. for Shapleigh Hardware Co.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 18, 1936.

(Appearance of Mr. Sam M. Degen and Mr. Harold J. Abrams as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

SAM M. DEGEN,
HAROLD J. ABRAMS.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 19, 1936.

(Appearance of Mr. Frank H. Haskins as Counsel for the Appellees Winkle Terra Cotta Co.)

The Clerk will enter my appearance as Counsel for the Appellees, Winkle Terra Cotta Co.

FRANK H. HASKINS,
506 Olive St.,
St. Louis, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 4, 1936.

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153 (Withdrawal of Fordyce, White, Mayne & Williams as Attorneys for Appellee National Surety Company.)

Come now Fordyce, White, Mayne and Williams, attorneys of record for the National Surety Company, one of the Appellees in the above entitled cause, and by leave of Court withdraw as counsel for said Appellee, National Surety Company.

FORDYCE, WHITE, MAYNE & WILLIAMS,
Attorneys for Appellee,
National Surety Company.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 19, 1936.

(Order Granting Leave to Messrs. Fordyce, White, Mayne & Williams to Withdraw as Counsel for Appellee, National Surety Co.)

November Term, 1935.

Friday, February 28, 1936.

In this cause Messrs. Fordyce, White, Mayne and Williams, attorneys of record for the National Surety Company, one of the appellees, have filed their withdrawal as counsel for said appellee, and for cause shown leave to withdraw as counsel for said appellee is by the Court hereby granted.

February 28th, 1936.

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154 (Notice of Filing and Hearing on Motion to Dismiss Appeal.)

To Guy S. Martin, Appellant, or Richard S. Bull, his Solicitor of Record:

Take notice that the Appellees in the above entitled cause will forthwith file their printed Motion To Dismiss Appeal in

the above entitled cause, and that the same will be presented to the Honorable United States Circuit Court of Appeals, Eighth Circuit, sitting at St. Paul, Minnesota on May 25th, at 9 A. M., or as soon thereafter as the matter may be heard by the Court.

OTTO O. FICKEISSEN,
J. H. CUNNINGHAM, JR.,
Solicitors for Appellees.

Received a copy of the above Notice, together with a copy of the printed Motion To Dismiss Appeal mentioned therein on this, the 15th day of May, 1936.

RICHARD S. BULL,
Solicitor for Appellant, Guy S. Martin.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 15, 1936.

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155 In the United States Circuit Court of Appeals,
Eighth Circuit.

Guy S. Martin, Appellant,
No. 10,536. vs. In Equity.
National Surety Company, a Corporation, et al., Appellees.

Appeal from the District Court of the United States for the Eastern District of Missouri.

Appellees' Motion to Dismiss Appeal.

Come now the undersigned appellees in the above-entitled cause, and each of them, and file this, their motion to dismiss the appeal of Guy S. Martin, appellant herein, and for grounds of this motion state:

1. That a final decree was entered in this cause on May 2, 1933 (R. 30), following the final hearing on the merits of all of the issues involved in the Amended Bill of Complaint (R. 6-15) and the joint and separate Amended Answer of defendants, Albert Clement Tobin and Guy S. Martin (R. 18-25), who were the only defendants not dismissed from the action, fully and finally adjudicating Guy S. Martin's lack of any right to the funds involved in this cause. Guy S. Martin had ninety days thereafter within which to take an appeal, and he cannot legally perfect an appeal herein one year and nine months later (R. 55) merely because the final decree of the trial court reserved jurisdiction of the cause to enable it to execute the decree by disbursing the funds

156 to the laborers and materialmen for whose benefit plaintiff recovered the money.

2. No citation has ever been issued herein to defendant, Albert Clement Tobin, as to whom any judgment or decree of this Court will become res adjudicata with respect to material matters, and no valid or legal service of citation has ever been made herein upon the following additional appellees, to-wit:

Schwab Safe Company,
Carlinville Tile Company,
Max Sher,
F. M. Tilley,
Walter M. Winslow,
Metzler Bros. Auto Repair Co.,
Ibbetson & Murphy Lumber Co.,
Illinois Power & Light Company.

3. The amended bill sought a perpetual injunction and a decree against two defendants, Martin and Tobin, for recovery of certain moneys. The final decree, as well as the subsequent order for disbursement of the funds, awarded and sustained the relief prayed for and vitally affects the rights of both of said defendants. There can be no separate appeal by defendant Martin alone, without any Summons and Severance as to defendant Tobin.

Wherefore, the respondents herein, and each of them, respectfully urge that the appeal of Guy S. Martin herein should be forthwith dismissed at the cost of appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 15, 1936.

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157 (Order of Submission.)

May Term, 1936.

Monday, May 25, 1936.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Richard S. Bull for appellant, continued by Mr. J. H. Cunningham, Jr., for appellees, and concluded by Mr. Richard S. Bull for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court, the motion of appellees to dismiss, and the briefs of counsel filed herein.

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158 (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 10,536.—MAY TERM, A. D. 1936.

Guy S. Martin, Appellant,

vs.

National Surety Company, a corporation, et al., Appellees.

Appeal from the District Court of the United States for the Eastern District of Missouri.

[August 12, 1936.]

Mr. Richard S. Bull (Messrs. Carter & Jones were with him on the brief), for Appellant.

Mr. J. H. Cunningham, Jr. (Mr. Otto O. Fickeissen, Messrs. Banister, Leonard, Sibley & Susman, Messrs. Blackinton, Reid & Harris, Mr. David K. Breed, Mr. Felix Cornetius, Messrs. Cullen, Fauntleroy & Edwards, Messrs. Curlee & Teasdale, Mr. Sam M. Degen, Mr. Roscoe Forth, Messrs. Greensfelder & Grand, Mr. Herbert F. Hahn, Mr. Frank H. Haskins, Messrs. Igoe, Carroll, Higgs & Keefe, Mr. William T. Keil, Mr. J. E. King, Messrs. Rassieur, Kammerer & Rassieur, Mr. E. H. Schwarzenbach, and Mr. Frank A. Zeis, were with him on the brief), for Appellees.

Before GARDNER and SANBORN, Circuit Judges, and NORDBYE, District Judge.

SANBORN, Circuit Judge, delivered the opinion of the Court.

Albert C. Tobin (hereinafter referred to as the contractor) on February 12, 1932, entered into an agreement with the United States to construct a postoffice building at Carlinville, Illinois. The contract price of $49,500 was to be paid as the work progressed, upon monthly estimates, subject to a deduction of ten per

cent to be retained by the Government until the completion and acceptance of the work. The contractor's bond was written by the National Surety Company (hereinafter called the surety) through its agent, the appellant, Guy S. Martin. The bond, as required by statute (40 U. S. C. §270) provided that the contractor "shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract".

In his application for the bond, the contractor agreed not to assign any payments under the contract, and to indemnify the surety for any loss it might sustain; he assigned to the surety "all the deferred payments and retained percentages, and any and all moneys and properties" that might be due him at the time of any breach or default in the contract or that might thereafter become due, to be credited upon any loss sustained by the surety because of the bond; and agreed that if the surety was required to reserve from its assets an amount to cover any contingent claim or claims arising from his default, he would deposit sufficient funds with the surety to cover such claims. Martin, as agent for the surety, executed this bond, contrary to the instructions of the surety, and the premium was never paid. The surety is now insolvent.

During the construction of the building, the contractor needed financial assistance to enable him to carry on the work, and Martin, who had helped him financially in connection with a prior construction contract, advanced various amounts over a period of several months. By December, 1932, when the building was nearing completion, Martin had advanced to the contractor, for use in constructing the building, an amount in excess of ten thousand dollars. The evidence is not entirely clear as to whether all of this money was used in the performance of the contract for the construction of the Carlinville postoffice. It is safe to say that not all of it was expended for labor and material.

In October, 1932, the surety first received notice that the contractor had failed to pay claims for labor and material. During the following November and December, the surety received further notice of the nonpayment by the contractor of such claims. On December 20, 1932, the contractor called upon the surety. The surety demanded of him that it be given control of the disbursement of retained percentages, deferred payments and any money due or to become due from the Government under the contract, and asked him to execute a power-of-attorney to it. After promising to consult his counsel and then to bring in the suggested

power-of-attorney, the contractor went to Martin and gave him a power-of-attorney, which Martin sent to Washington accompanied by a letter from the contractor requesting that checks payable to him be sent to Martin.

When the December, 1932, and January, 1933, estimates, aggregating $10,448.10, were approved by the proper Government officer, the contractor sent Martin to Washington to collect this money. At that time the surety did not know that Martin had a power-of-attorney from the contractor. The amount of these estimates was paid to Martin on February 6, 1933. The building was then substantially completed and the Government was in possession. There was a balance of $5,700 due the contractor, after deducting the progress payments made to Martin, which balance was the retained percentage plus a small sum withheld by the Government to cover unfinished work.

On February 9, 1933, the day after the surety learned of the payment of the December and January estimates to Martin, it brought this suit in equity to enjoin the payment to Martin or the contractor of the balance still due from the Government under the contract, to require that such payment be made to the surety for the benefit of laborers and materialmen, and to compel Martin to pay into court, for the benefit of the surety and of creditors having unpaid claims for labor and material, the $10,448.10 received by him from the Government. The court granted a temporary injunction preventing Martin and the contractor from collecting anything more from the Government, and directed Martin to deposit with the Clerk of the Court $9,000 of the $10,448.10 collected by him. Thereafter Martin and the contractor filed their joint answer, admitting that Martin had collected $10,448.10 due upon the December and January estimates, and alleging that Martin had collected it in order to reimburse himself in part for what the contractor owed him; that $10,405.65 of the amount which was due Martin from the contractor was for money advanced in connection with the construction of the building here involved, plus interest upon such advances; that Martin's lien on the proceeds of the contract was at least of equal standing with that of the surety, if the surety had any lien. The defendants (Martin and Tobin) waived any claim upon the balance still due from the Government.

On May 2, 1933, the trial court, after finding that the Government still owed the contractor $5,700, and that labor and material claims unpaid were in excess of $15,000, entered a decree, (1) mak-

ing the temporary injunction theretofore issued permanent; (2) authorizing the plaintiff surety to collect the balance due under the contract and to deposit it in court "to abide further orders as to the disposition of said funds"; (3) directing Guy S. Martin to pay $1448.10 into court "to be deposited by the Clerk of said Court with the $9,000.00 heretofore ordered paid into Court by the defendant, Guy S. Martin, said deposit to abide further orders as to the disposition of said fund"; (4) dismissing the plaintiff's complaint as against certain other defendants; (5) reserving to the court "the right to enter such further orders and decrees in this cause as may be necessary in the premises"; and (6) taxing costs against the defendants Tobin and Martin.

In January, 1934, the surety petitioned the court for an order fixing the time for filing claims. An order was entered requiring verified claims to be filed on or before March 24, 1934. On that date, Martin filed his "Exceptions, and in the event they are overruled, Proof of Debt, of Guy S. Martin", by which he excepted to the order fixing the time for filing claims, on the ground that he was entitled to the entire fund, but asserted a claim to $10,405.65 in the event his exceptions were overruled. Other claimants filed exceptions to Martin's claim on various grounds, one of which was that the decree of May 2, 1933, was an adjudication that he had no right to the fund or any portion thereof.

The court duly considered Martin's claim, and found that he was entitled to nothing because: (1) he was a partner of the contractor and his (Martin's) claim was inferior to those of the laborers and materialmen; (2) his collection of the estimates was a fraud upon the rights of creditors of the contractor, and the contractor's execution to Martin of the power-of-attorney was a fraud upon the surety and upon those who had furnished labor and material; (3) the claims for labor and material were superior to the claim of Martin and exceeded the fund deposited, and the surety company was insolvent; (4) Martin's hands were not clean because in a suit by the Maryland Casualty Company against Martin and Tobin, Martin had testified that of the advances which he claimed to have made to Tobin in connection with the performance of the work here involved, the sum of $5,672 covered amounts expended in connection with other work done by the contractor at Havana, Illinois; (5) Martin did not furnish labor or material, but merely loaned money to the partnership enterprise.

Thereupon the trial court entered a decree rejecting Martin's claim and directing the disbursement of the fund in court to

claimants whose claims had been allowed. These claims were those of laborers and materialmen.

From this decree, Martin alone appealed, naming as appellees the surety and all claimants whose claims had been allowed.

Some eight claimants, who were nonresidents of Missouri and had no attorneys of record, were served with citation on appeal through a trustee appointed for them by the trial court. Appellees contend that such service was insufficient, and that the appeal should therefore be dismissed. It does not appear that the method adopted for securing service was ineffectual or prejudicial. The record does not show whether the claimants so served have appeared generally in this court or not.

The purpose of the issuance and the service of a citation on appeal is to give notice and opportunity to appear. *Mattingly* v. *N. W. Virginia Railroad*, 158 U. S. 53; *Lockman* v. *Lang, et al.* (C. C. A. 8), 132 F. 1, 4; *Mitchell* v. *Lay, et al.* (C. C. A. 9), 48 F. (2d) 79, 85; *Simkins Federal Practice*, §971. The service of such a citation is not a fundamental jurisdictional requirement. *Lockman* v. *Lang, et al., supra; Mattingly* v. *N. W. Virginia Railroad, supra; Weinstein* v. *Black Diamond S. S. Corporation, et al.* (C. C. A. 2), 31 F. (2d) 519; *Hunn, et al.* v. *Lewis, et al.* (C. C. A. 8), 25 F. (2d) 271, 272; *In re T. E. Hill Co.* (C. C. A. 7), 148 F. 832; *Osage Oil & Refining Co.* v. *Mulber Oil Co.* (C. C. A. 10), 38 F. (2d) 396, 398; *Galveston H. & N. Ry. Co.* v. *House, et al.* (C. C. A. 5), 102 F. 112. We think that this appeal should not be dismissed on the ground of the claimed insufficiency of the service of citation on some of the appellees.

It is also contended on behalf of the appellees that the contractor was a necessary party to this appeal. We think he was not. He made no claim to the fund. His answer constituted a disclaimer. He was not substantially affected by the decree appealed from. A nominal party without interest in the judgment or decree appealed from need not join in the appeal. *United States Fidelity & Guaranty Co.* v. *Sweeney, et al.* (C. C. A. 8), 80 F. (2d) 235, 238; *Higbee* v. *Chadwick* (C. C. A. 6), 220 F. 873; *Axelrod* v. *Osage Oil & Refining Co., et al.* (C. C. A. 8), 29 F. (2d) 712; *Marker, Federal Appellate Jurisdiction & Procedure*, page 153, § 126. Where a decree is against two or more defendants, but several as to one, he may appeal without the other defendants joining and without an order of severance. *Federal Intermediate Credit Bank* v. *L'Herisson* (C. C. A. 8), 33 F. (2d) 841, 842, 843; *Osage Oil & Refining Co.* v. *Mulber Oil Co.* (C. C. A. 10), *supra;*

Hirschfield v. *McKinley* (C. C. A. 9), 78 F. (2d) 124, 129; *Winters* v. *United States*, 207 U. S. 564, 575; *Marker, Federal Appellate Jurisdiction & Procedure*, page 153, § 126.

It is further contended by the appellees that the interlocutory decree of May 2, 1933, was a final adjudication of Martin's rights to the fund, and that, since he has taken no appeal from that decree, this appeal should be dismissed. The language of the decree of May 2, 1933, is a complete answer to this contention. The court merely directed Martin to deposit the payments in controversy in court "to abide further orders as to the disposition of said fund". The court later considered Martin's claim and the exceptions thereto, and entered the decree appealed from, which is the final decree in this suit. The issues raised by the pleadings were not determined by the interlocutory decree, the purpose of which was obviously to preserve the status quo and to bring into being a fund to abide the final result of the litigation.

A decree to be final for the purposes of appeal must terminate the litigation of the parties on the merits of the case, so that, if there is an affirmance, the court below will have nothing to do but execute the decree appealed from. *Grant* v. *Phoenix Ins. Co.*, 106 U. S. 429, 430, 431; *Louisiana Bank* v. *Whitney*, 121 U. S. 284, 285; *Norris Safe & Lock Co., et al.* v. *Manganese Steel Safe Co.* (C. C. A. 9), 150 F. 577.

This brings us to a consideration of the merits of this controversy. The surety paid no claims for labor or material, and furnished no money for the completion of the contract. It had no valid assignment of the progress payments collected by Martin, because of the provisions of 31 U. S. C., § 203, making such an assignment void. See *London & Lancashire Indemnity Co.* v. *Endres* (C. C. A. 8), 290 F. 98; *Spofford* v. *Kirk*, 97 U. S. 484; *National Bank of Commerce* v. *Downie*, 218 U. S. 345. It therefore had no title to the progress payments which were made to Martin. The most that can be said for the surety is that it had the right to have the money collected by Martin applied to the payment of claims for which the surety would otherwise be liable, and which claims, if paid by it, would give to the surety a superior right to the fund in court by reason of subrogation.

It becomes necessary, then, to determine whether the equitable rights, if any, of the unpaid laborers and materialmen are superior to the rights of Martin.

In *Riverview State Bank* v. *Wentz*, 34 F. (2d) 419, this court held that a surety on a contractor's bond, which had paid the

claims of materialmen, became subrogated to their rights, and that the rights so acquired by the surety in the retained percentages were superior to the rights of a bank which had loaned money to the contractor for use in the prosecution of the work and had taken an assignment of the "proceeds from estimates to become due said contractor under the terms and provisions of said contract". This holding is the equivalent of a ruling that the rights of materialmen to retained percentages under a contract for public work are superior to the rights of a general creditor of the contractor under an assignment.

In *United States Fidelity & Guaranty Co.* v. *Sweeney, et al.*, 80 F. (2d) 235, 238, Judge Gardner, in delivering the opinion of this court, said: "Laborers and materialmen, however, have an equitable right to payment from funds due a contractor on a public improvement in preference to general creditors. *Belknap Hardware & Mfg. Co.* v. *Ohio River Contract Co.* (C. C. A. 6), 271 F. 144. The statutory requirement of a bond to protect them is not inconsistent with such equitable rights. *American Surety Co.* v. *Westinghouse Elec. Mfg. Co.* (C. C. A. 5), 75 F. (2d) 377. There is a recognized equitable right of unpaid furnishers of labor or materials to such part of the contract price as may remain in the possession of the government after the completion of the work by the contractor. *Riverview State Bank* v. *Wentz* (C. C. A. 8), 34 F. (2d) 419; *Henningsen* v. *United States Fidelity & Guaranty Co.*, 208 U. S. 404, 28 S. Ct. 389, 52 L. Ed. 547; *Farmers' Bank* v. *Hayes* (C. C. A. 6), 58 F. (2d) 34; *American Surety Co.* v. *Westinghouse Elec. Mfg. Co.* (C. C. A. 5), 75 F. (2d) 377. Appellant was bound by contract to pay the claims for labor and material, and upon paying these claims it was entitled to be subrogated to the superior equities of the laborers and materialmen; and when payment was made its rights related back to the time of making the contracts."

The appellant contends that in that case this court limited "the superior equities of the laborers and materialmen" to retained percentages; but the opinion shows that the fund the balance of which was there in dispute had been made up of "retained percentages and deferred payments" [page 237 of 80 F. (2d)], and it is plainly stated that the equitable rights applied to "funds due a contractor on a public improvement". In view of the decision in that case, we think the court below, in the case at bar, could only hold that the rights of laborers and materialmen in the funds remaining due the contractor upon completion of the contract were superior to the rights of Martin, who at best was a general cred-

itor and in no better position than the bank in the case of *Riverview State Bank* v. *Wentz, supra*. The fact that Martin had actually secured possession of the last two progress payments from the Government prior to the suit, would not alter the situation. The payments were made to him as attorney-in-fact for the contractor, after completion of the contract. Martin had full knowledge of all of the facts, and had no better title to these payments than the contractor himself would have had. This court said in *United States Fidelity & Guaranty Co.* v. *Sweeney, et al., supra*, page 239: "As long as the percentages held back to secure performance of the contract can be identified and followed, they can and should be subjected in equity to the lien of the security." While the word "percentages" is used, that would constitute no basis for refusing to follow progress payments if in equity these belonged to laborers and materialmen.

There is unquestionably authority for the proposition that laborers and materialmen have no rights superior to those of general creditors of a contractor in anything due the contractor except perhaps retained percentages. [*Third Nat. Bank* v. *Detroit Fidelity & Surety Co.* (C. C. A. 5), 65 F. (2d) 548; *Kane, et al.* v. *First Nat. Bank of El Paso, Tex.* (C. C. A. 5), 56 F. (2d) 534; *Fidelity & Deposit Co.* v. *Union State Bank* (D. C. Minn.), 21 F. (2d) 102. See also dissenting opinions of Judge Symes in *Riverview State Bank* v. *Wentz* (C. C. A. 8), 34 F. (2d) 419, 422; of Judge Sibley in *American Surety Co.* v. *Westinghouse Electric Mfg. Co.* (C. C. A. 5), 75 F. (2d) 377, 380; and of Mr. Justice Roberts in *American Surety Co.* v. *Westinghouse Electric Mfg. Co.*, 296 U. S. 133, 140.] This court has, however, adopted the contrary view, and there is no occasion to indulge in a discussion of opposing authority, which would only have the effect of making what is already confusing, more obscure. Much of the confusion comes from the fact that, in deciding the case of *Henningsen* v. *U. S. Fidelity & Guaranty Co.*, 208 U. S. 404, the Supreme Court did not make it clear whether the surety, who had paid labor and material claims and whose rights were held to be superior to those of a general creditor holding an assignment from the contractor, was subrogated to the rights of laborers and materialmen or subrogated to the rights of the contractor as of the time the bond was written, and whether, if the surety was subrogated to the rights of laborers and materialmen, such rights extended beyond retained percentages and included all deferred payments due upon the completion of the contract. It is to be hoped that in a proper case the Supreme Court will take occasion to clarify the situation, so

that it may be definitely known what equitable rights laborers and materialmen have in addition to their rights under a public contractor's bond, and whether such rights, if any, are limited to retained percentages or apply to progress payments as well. This is important to those furnishing labor and materials for public works as well as to those called upon to make loans to contractors to carry on such work.

In view of the decisions of this court herein referred to, we think it is unnecessary to consider other questions raised in the briefs.

The decree is *Affirmed.*

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168 (Decree.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1936.

Monday, August 17, 1936.

Guy S. Martin, Appellant,
No. 10536. vs.
National Surety Company, a Corporation, and others named in the Citation on Appeal.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and on the motion of appellees to dismiss, and was argued by counsel.

On Consideration Whereof, It is now here ordered by this Court that the said motion of appellees to dismiss, be, and the same is hereby, denied, and It is further ordered, adjudged, and decreed, by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the National Surety Company, a Corporation, and others named in the Citation on Appeal, have and recover against Guy S. Martin the sum of Twenty Dollars for their costs herein and have execution therefor.

August 17, 1936.

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169 (Application for Stay of Mandate.)

Now comes the appellant, Guy S. Martin, by his solicitor and counsel, and respectfully submits to this Honorable

Court that his bona fide intention and desire, under the advice of his said counsel to that effect, is to file a petition in the Supreme Court of the United States for a writ of certiorari to review the judgment herein in this court, and, therefore, he moves and prays that the mandate of this Honorable Court in this cause may be stayed for a period of thirty (30) days from and after August ....., 1936, to permit his counsel to prepare, duly present and submit to the Supreme Court a petition for such writ accordingly.

RICHARD S. BULL,
Solicitor for Appellant.

Carter & Jones,
Of Counsel.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 27, 1936.

(Order Staying Issuance of Mandate.)

May Term, 1936.

Monday, August 31, 1936.

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme
170 Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 31, 1936.

(Motion for Further Stay of Mandate.)

Now comes the appellant, Guy S. Martin, by his solicitor and counsel, and respectfully states to this Honorable Court that since the order entered herein on the 31st day of August, 1936, staying the mandate in this cause for a period of thirty (30) days from and after said date, to permit the preparation and filing in the Supreme Court of a petition for a writ of certiorari to review the judgment herein of this Court, it has remained and it still remains the bona fide in-

tention of appellant to file such petition, but that for the reasons hereinafter mentioned such petition has not as yet been filed.

Appellant further states that for a period of more than four weeks after the opinion of this Court was entered and a copy thereof received, the only counsel employed by him with full knowledge and understanding of the issues and principles involved and who had consistently been in active charge of this cause on his behalf was engaged in other work of a nature that required all of the attention and time of said counsel, including travel and services in other cities, which consumed a total of fifteen days' time during such period; that during a portion of such period, also, appellant was out of the city and unable adequately to communicate with his said counsel and discuss the questions presented by the aforesaid opinion; that as soon as it was reasonably possible for said counsel to devote the attention and time necessary to arrive at an opinion and to consult with appel-
171 lant as to the advisability of seeking a further review of this cause, he did so but that the taking of definite action to that end has been delayed by the circumstances hereinbefore referred to.

Appellant further states, and respectfully directs the attention of this Court to the fact, that in this cause there are of record some sixty-five appellees, represented by more than twenty different counsel, and that the filing now of a petition for a writ of certiorari, the giving of notice of such filing and the submission of proof thereof will require an additional period of time which should not exceed thirty days, and appellant states that if pursuant to this application the stay of the mandate herein be extended for the period requested, he will diligently proceed to the filing of the record and of a petition for a writ of certiorari to obtain a review herein and will endeavor in good faith within such extended period to take expeditiously all appropriate and necessary action as to the giving of notice and the filing of due proof thereof as required by the rules of the Supreme Court.

Wherefore, appellant prays that for the reasons and purposes aforesaid, the mandate of this Honorable Court in this cause may be stayed for a period of thirty (30) days additional from and after October 1, 1936, or from and after entry of an order granting an extension of such stay.

RICHARD S. BULL,
Solicitor for Appellant
Guy S. Martin.

Carter & Jones,
Of Counsel.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 30, 1936.

---

172 (Order Further Staying Issuance of Mandate.)

October Term, 1936.

Monday, October 5, 1936.

On Consideration of the motion of appellant for a further stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, further stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

October 5, 1936.

---

173 (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein Guy S. Martin was Appellant and the National Surety Company, et al., were Appellees, No. 10536, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eighth day of October, A. D. 1936.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 174] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 7, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
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CHARLES ELMORE C
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 500

GUY S. MARTIN,
Petitioner,

v.

NATIONAL SURETY COMPANY, a Corporation, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel:
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1936.

GUY S. MARTIN,
Petitioner,

v.

NATIONAL SURETY COMPANY, a Corporation, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Guy S. Martin, respectfully presents this, his petition for a writ of certiorari, addressed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding it and the clerk thereof to certify to this Court the record and proceedings of the case in that court, numbered 10,536 therein, wherein your petitioner was appellant and National Surety Company, a corporation, and other corporations and individuals were appellees, together with its opinion therein, for review and determination of said cause by this Court.

(Note: Record references throughout are to pages in printed copies, not to original record.)

A.

STATEMENT OF THE MATTER INVOLVED.

I. The Issue Presented.

On the merits of this case the Court of Appeals passed upon but one question, and the decision announced its conflict with other Circuit Courts of Appeals and its view that the Supreme Court should settle that question to avoid the confusion which now exists. The question was:

Is money caused to be repaid to the lender by a contractor on a United States Government contract out of progress payments subject, in the hands of the lender, to an equitable lien in favor of materialmen and laborers, requiring the lender to turn over the money to materialmen and laborers as the creditors entitled thereto?

The rule favored by the federal courts has been that the money reserved under the terms of construction contracts for public works is subject to a prior lien in favor of unpaid materialmen and laborers, but that such lien or right does not extend to payments made as the work progresses. The Court of Appeals in this case held that the lien extended to progress payments collected by a lender of money at the instance of the contractor, and its decision in that respect presents a clear conflict.

II. Statement of Facts and Proceedings.

Respondent, National Surety Company, a corporation organized under the laws of New York, filed its bill in equity in the District Court at St. Louis, Missouri, on February 9, 1933, naming as defendants Guy S. Martin (the petitioner) and Albert Clement Tobin, citizens of Missouri, and certain officials of the United States Government as to

whom the cause was subsequently dismissed by the District Court. The respondent sued as surety on a bond furnished by Tobin in connection with a contract which he had been awarded for the construction of the United States post office building at Carlinville, Illinois. In its amended bill of complaint (R. 6), the surety alleged that there were unpaid claims outstanding for labor and material furnished the contractor, and asked an injunction against the collection by the contractor, or by Martin as his attorney-in-fact, of the unpaid balance due under the contract (consisting of the retained percentage and a small sum withheld by the Government to cover unfinished work), and against the disposition by either of them of money theretofore received thereunder, particularly the sum of $10,448.10, which represented the proceeds of estimates for work during the months of December, 1932, and January, 1933. Such sum had been collected by Martin (petitioner here) under a power of attorney executed to him by the contractor. Also sought by the surety was an order directing Martin to deliver said sum of $10,448.10 to the clerk of the court, or to a receiver, if one should be appointed.

Martin and Tobin, in answering, pleaded their willingness to have the sum still due and unpaid under the contract used for the payment of claims for material and labor furnished in the construction of the building (R. 23), but asserted as to the $10,448.10 collected by Martin that this had been applied with authority from Tobin to the repayment of an indebtedness owing from the latter to the former and arising from the advancement of various sums of money for use in and expenses of the building construction (R. 24). It was further asserted that Martin was entitled to retain the sum collected (excepting for a small balance over the indebtedness), and that his right thereto

was superior or at least equal to that, if any, the surety may have had before delivery of the check by the United States Government (R. 25).

Following a hearing on an order to show cause, the District Court issued a restraining order enjoining defendants Tobin and Martin from collecting further payments under the contract, and directed Martin to deposit in court the sum of $9,000.00 (R. 17). Subsequently, after a hearing on the merits, the temporary injunction was made permanent and the balance of $1,448.10, which had been collected by Martin, was ordered paid into court and deposited with the $9,000.00 theretofore paid in, such deposit to abide further orders as to the disposition of the fund (R. 30-31). This decree was based on findings by the Court, among others, of certain facts which, as they were undisputed, may be summarized from such findings as follows: That one of the conditions of the bond given by the contractor and required by statute (40 U. S. C., Sec. 270), was that the contractor "shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract" (R. 26, par. 2); that the contractor, in his application for bond, had agreed to a provision assigning to the surety "all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable" to the contractor "at the time of any breach or default" in the construction contract (R. 27, par. 4, "6th"); that Martin had executed the performance bond as agent of the surety contrary to the instructions of his superiors (R. 27, par. 5); that Martin had advanced Tobin funds from time to time to enable him to carry on the work of constructing both the Carlinville post office and one, previously constructed, at Havana, Illinois (R. 27, par. 6); that in December, 1932, when

the Carlinville building was nearing completion the contractor was indebted to Martin in a sum in excess of $10,000 for money loaned (R. 27, par. 7); that at that time the contractor gave Martin a power of attorney authorizing collection of the balance due on the contract, and that the final estimate of $10,448.10 was collected on February 6, 1933, by Martin, who sought to apply the same to the indebtedness of Tobin (R. 28, pars. 8 and 9); that Martin was fully advised as to the terms of the contract, the bond and the application for bond, and that the building had been substantially, but not entirely, completed, and had been occupied but not formally accepted by the Government (R. 28, par. 10); that the amount still due from the Government on the contract was approximately $5,700 and that the amount of outstanding bills for labor and materials was in excess of $15,000 (R. 28, par. 11).

On its findings the District Court concluded, among other things, that the contractor's failure promptly to pay all persons who supplied labor and materials, as required by the *bond*, constituted a breach and default in the performance of the *contract* (R. 29, par. 4); that the contractor was in default and had breached the contract at the time the power of attorney was given, and at the time the money was collected (R. 29, par. 5); that by the application for bond the contractor had assigned to the surety all deferred payments, retained percentages and all money that might be or become payable at the time of any breach or default in the performance of the contract, and that by virtue of this agreement the surety was entitled to have available all sums due from the Government in December, 1932, and subsequent thereto, including the sum of $10,448.10 collected by Martin (R. 29, par. 7).

Martin, the petitioner here, complied with the orders requiring payment of the $10,448.10 into court, and there-

after, on January 24, 1934, an order was entered at the instance of the surety requiring all parties claiming any interest in the funds on deposit to file claims within a prescribed period, and requiring the filing of any objections to any claims so filed within an additional period prescribed (R. 33-34).

Martin thereupon filed his objections and exceptions to such order, and, coupled therewith in the event of their being overruled, his claim in the amount of $10,405.65. This was itemized and verified in the form required by the order, and recited that it represented payments for labor and material bills advanced on behalf of the contractor by the claimant, together with other charges and expenses incurred for the performance of the Carlinville contract; and interest thereon (R. 34-38).

Numerous other claims were filed, and Martin objected and excepted to their filing and allowance (R. 40-42). Exceptions were also filed by several claimants to the claim of Martin (R. 39-40).

As summarized in the opinion of the Court of Appeals (R. 157-158), the action then taken, after a hearing, was as follows:

> "The court duly considered Martin's claim, and found that he was entitled to nothing, because: (1) he was a partner of the contractor and his (Martin's) claim was inferior to those of the laborers and materialmen; (2) his collection of the estimates was a fraud upon the rights of creditors of the contractor, and the contractor's execution to Martin of the power of attorney was a fraud upon the surety and upon those who had furnished labor and material; (3) the claims for labor and material were superior to the claim of Martin and exceeded the fund deposited, and the surety company was insolvent; (4) Martin's hands were not clean because in a suit by the Maryland

Casualty Company against Martin and Tobin, Martin had testified that of the advances which he claimed to have made to Tobin in connection with the performance of the work here involved, the sum of $5,672 covered amounts expended in connection with other work done by the contractor at Havana, Illinois; (5) Martin did not furnish labor or material, but merely loaned money to the partnership enterprise.

"Thereupon the trial court entered a decree rejecting Martin's claim and directing the disbursement of the fund in court to claimants whose claims had been allowed. These claims were those of laborers and materialmen."

From this decree Martin appealed to the Circuit Court of Appeals for the Eighth Circuit, which, on August 12, 1936, handed down its opinion affirming the decree below (R. 154), and on August 17, 1936, a decree was entered thereon (R. 162).

In such opinion the Eighth Circuit Court ruled that the surety "had no valid assignment of the progress payments collected by Martin because of the provisions of 31 U. S. C., Sec. 203, making such an assignment void" (R. 159), but that those who had furnished labor and material for the construction of the building had rights in funds remaining due the contractor upon completion of the contract superior to those of Martin, and that such rights extended beyond the retained percentages and to the progress payments which could be identified and followed, even after their collection (R. 161).

Though reaching such decision, the Court recited:

"There is unquestionably authority for the proposition that laborers and materialmen have no rights superior to those of general creditors of a contractor

> in anything due the contractor except perhaps retained percentages,"

listing the opinions, including those from other Circuit Courts of Appeal, taking that position. In adopting the contrary view the Court expressed the hope that in a proper case the Supreme Court will take occasion to clarify the situation, in view of the importance of the question (R. 161-162).

In so holding, the Court declined to consider other questions than the one decided (R. 162).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

In asking a review of this case the petitioner respectfully shows that the decision of the Circuit Court of Appeals presents a threefold reason therefor. By its ruling that progress payments made under a Government contract are subject to an equitable lien in favor of unpaid laborers and materialmen, which is superior to the rights of either the contractor or a general creditor, even after collection of such payments, that Court (1) has run into conflict with decisions of other Circuit Courts of Appeal on the same matter; (2) has decided an important question relating to public works contracts and arising under federal law which has not been, but according to that Court itself, should be, settled by this Court; and (3) has decided such question in a way probably in conflict with applicable, though not specifically controlling, decisions of this Court.

The cases believed to conflict squarely with the decision

here, including those mentioned in the opinion as doing so (R. 161), are the following:

Third Nat. Bank v. Detroit Fidelity & Surety Co. (C. C. A. 5), 65 F. (2d) 548, cert. denied 290 U. S. 667;

Kane et al. v. First Nat. Bank of El Paso, Tex. (C. C. A. 5), 56 F. (2d) 534, cert. denied 287 U. S. 603;

Maryland Casualty Co. v. Board of Water Commissioners (C. C. A. 2), 66 F. (2d) 730, cert. denied 290 U. S. 702;

Fidelity & Deposit Co. v. Union State Bank (D. C. Minn.), 21 F. (2d) 102.

II.

In addition, and so that the points may be considered should the writ be issued for all or either of the foregoing reasons, the petitioner represents that other questions were involved below which remained undecided by the Circuit Court of Appeals, and which afford no basis either for an affirmance of the judgment and decree of the District Court nor, of themselves, for a denial of the writ. The nature of such other questions is indicated by the District Court's findings as summarized in the portion of the opinion on appeal (R. 157) heretofore quoted, but they were not in any way mentioned as controlling or influencing the opinion. In the belief that this Court may desire all issues to be more fully developed than if the single point decided by the Circuit Court of Appeals should alone be discussed, these questions are touched upon in the accompanying brief and may be grouped and outlined here as follows:

a. The finding by the District Court that Martin was a partner of Tobin on the Carlinville contract and therefore that he was liable for labor and material claims and that his claim was inferior to the others (R. 47) was not sup-

ported by the evidence and was erroneous. This finding was based solely on Tobin's testimony that he had arranged to borrow money from Martin and to divide profits with him, but this arrangement, if it existed, was made in connection with an earlier contract and it was not understood to apply to the Carlinville contract because it had not then been obtained (R. 139). Moreover, a lender of money is not made a partner in any sense merely because he is to receive a part of the profits in addition to or in lieu of interest.

b. There was no basis for the findings by the District Court that the execution of the power of attorney to Martin and his collection of the funds due for completed work constituted a fraud upon the surety and the materialmen and laborers (R. 47-48), as these actions took place subsequent to the termination of Martin's agency with the surety and were wholly independent of and unrelated to such agency.

c. The District Court erred in finding that the claim of $10,405.65 filed by Martin as representing his account on the Carlinville contract, included items of $5,672.00 advanced on the Havana contract, and in concluding therefrom that Martin did not come into equity "with clean hands" (R. 48). Such items were *not* in the claim filed (R. 34-38) nor in the audited record of Martin's account covering the Carlinville contract (Martin's Exhibit O, R. 125-127), but were in the account covering *both* contracts (Martin's Exhibit N, R. 125) and were fully explained as representing bills assumed and guaranteed by Martin on the Havana contract (R. 120, 121, 129, 130). The deposition proof referred to in the finding could of necessity relate only to the account covering both contracts, and there was no misrepresentation therein nor in the claim filed by Martin.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 10,536, Guy S. Martin, Appellant, v. National Surety Company, a corporation, et al., Appellees, and that the said decree of the Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GUY S. MARTIN,

By HAROLD R. SMALL,
Counsel for Petitioner.

Of Counsel:

RICHARD S. BULL.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1936.

GUY S. MARTIN,
Petitioner,

v.

NATIONAL SURETY COMPANY, a Corporation, et al.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The District Court filed no opinion in the case. The opinion of the Circuit Court of Appeals for the Eighth Circuit is not yet officially reported, but it is reported at 85 F. (2d) 135, and is printed in full in the record, beginning at page 154. It was rendered on August 12, 1936.

II.

JURISDICTION.

(a) Petition for certiorari is filed upon authority of Judicial Code, Section 240, as amended (28 U. S. C., Sec.

347a), which gives this Court jurisdiction to review any judgment or decree of a United States Circuit Court of Appeals.

(b) The date when the judgment became final was August 17, 1936, when the decree of affirmance was entered (R. 162).

(c) Respondent National Surety Company in the District Court sought and obtained a decree requiring the payment into court by petitioner of money collected at the instance of the contractor under a United States Government construction contract and which petitioner had sought to apply to an indebtedness due from the contractor (Decrees filed February 23, 1933, and May 2, 1933; R. 17, 30). Thereafter the funds which were deposited pursuant to such decrees were ordered disbursed to certain creditors who had furnished material and labor to the contractor and who had been allowed to file claims, and petitioner's claim was disallowed (decree filed November 26, 1934; R. 49-54). This latter decree was the final decree in the District Court and was appealed by petitioner to the Circuit Court of Appeals for the Eighth Circuit, by which it was affirmed (R. 162).

(d) Cases believed to sustain the jurisdiction of this Court to review the decision of the Court of Appeals are:

Magnum Import Co. v. Houbigant, Inc., 262 U. S. 159;
Columbus Watch Co. v. Robbins, 148 U. S. 266;
Henningsen v. U. S. Fidelity & Guaranty Co., 268 U. S. 404.

III.

STATEMENT OF THE CASE.

As a statement containing all that is deemed material to the consideration of the questions presented has been given in the petition, it will not be repeated here.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that money caused to be repaid to the lender by a contractor on a United States Government contract out of progress payments was subject, in the hands of the lender, to an equitable lien in favor of materialmen and laborers, requiring the lender to turn over the money to materialmen and laborers as the creditors entitled thereto.

2. The Court of Appeals, in failing to reverse the District Court in its finding that petitioner was a partner of the contractor and therefore that he was liable for labor and material claims and that his claim was subject thereto, erred for the reasons recited in paragraph IIa of Section B of the petition for the writ.

3. The Court of Appeals, in failing to reverse the District Court in its findings that the execution of the power of attorney to petitioner and his collection of the funds due for completed work constituted a fraud upon the materialmen and laborers, erred for the reasons recited in paragraph IIb of Section B of the petition for the writ.

4. The Court of Appeals, in failing to reverse the District Court in its finding that the claim filed by petitioner included items advanced on the Havana contract, and in concluding therefrom that petitioner did not come into equity "with clean hands," erred for the reasons stated in paragraph II c of Section B of the petition for the writ.

V.

ARGUMENT.

Summary of Argument.

A.

Where a contractor under a United States Government contract has caused money due on *progress payments* to be collected and to be repaid to one from whom he had borrowed, the money in the hands of the lender is not subject to any lien in favor of unpaid materialmen and laborers requiring its payment to them as the creditors entitled thereto. In holding the contrary, the Court of Appeals is in conflict with decisions of other Courts of Appeals.

B.

The decisions which have not passed upon this precise question, but which declare a lien or superior equities in favor of sureties or of labor and material creditors on public works contracts, have involved either (1) retained percentages only or (2) other funds due but still retained and unpaid. Such cases, while not specifically controlling or analogous, are applicable in principle and the decision of the Court of Appeals here is in conflict therewith.

C.

Evidence that in connection with an earlier contract the contractor had arranged to borrow money from petitioner and to divide profits with him did not subject petitioner to the liability of a partner on the Carlinville contract, which had not then been obtained. Even if such arrangement existed and was extended to the later contract no partnership in any sense was created thereby.

D.

In accepting a power of attorney from the contractor and in collecting the funds due for completed work in order to repay an existing indebtedness, petitioner was entirely within his rights and such actions constituted no fraud whatever upon either the surety on the bond or the creditors secured thereby. No implication of fraud arises from the fact that petitioner formerly had been an agent of the surety, and as such had executed the bond, for it was his vigilance alone, and not any confidential information received as agent, which prompted the subsequent action to protect his own interests.

E.

No basis whatever appears for an assertion that in the claim filed by petitioner, pursuant to the District Court's order, there was misrepresentation as to the items covered by such claim and that therefore he "did not come into equity with clean hands."

Argument.

Points A and B.

The contention of the petitioner that the money caused to be repaid to him out of progress payments collected at the instance of the contractor was not, in his hands, subject to an equitable lien requiring that it be turned over to unpaid laborers and materialmen, is fully sustained by the following decisions, with all of which the opinion of the Court of Appeals conflicts:

Kane v. First Nat. Bank (C. C. A. 5), 56 F. (2d) 534 (cert. denied 290 U. S. 667);

Third Nat. Bank v. Detroit Fidelity & Surety Co. (C. C. A. 5), 65 F. (2d) 548 (cert. denied 290 U. S. 667);

Maryland Casualty Co. v. Board of Water Comm'rs (C. C. A. 2), 66 F. (2d) 730 (cert. denied 290 U. S. 702);

Fidelity & Deposit Co. v. Union State Bank (D. C. Minn.), 21 F. (2d) 102.

It may be observed at the outset that neither the surety nor those whose claims it secured possessed any rights under the purported assignment to it of payments becoming due the contractor (R. 91). The District Court in this regard erred in its conclusion (R. 29, par. 7) that by reason of this assignment the surety was entitled to have the progress payments collected by Martin available for the payment of bills, but the Court of Appeals correctly held (R. 159) that such assignment was void because of the provisions of 31 U. S. C., Sec. 203, and that therefore the surety had no title to the money. (See London & Lancashire Indemnity Co. v. Endres (C. C. A. 8), 290 F. 98; Spofford v. Kirk, 97 U. S. 484; National Bank of Commerce v. Downie, 218 U. S. 345.) The discussion here thus is narrowed to one of equitable rights and of cases in which that issue alone is involved.

In the *Maryland Casualty Co.* case the contractor had defaulted on his contract and the surety had been required to complete it. Although holding that funds unpaid at the time of the default should be used for the benefit of the surety, the Court recognized the superior right of a bank, which had loaned money for the work, to receive and apply to the debt of the contractor payments made prior to the default (66 F. [2d], l. c 738-739).

In the *Fidelity & Deposit Co.* case it was expressly ruled that payments received by the contractor during the

progress of the work belong to him unconditionally and unimpaired by any lien or equitable right to which the surety might be subrogated.

In *Kane v. First National Bank* the appellate court passed squarely upon the question here involved, saying (56 F. [2d], at page 535):

> "Money or checks paid to him as the work progresses are the property of the contractor unincumbered by any trust, just as are payments to others for goods manufactured or services performed. The contractor's banker may receive such checks and is not bound to see to their application, *nor to ascertain the state of the contractor's account with each contract; nor, if he knows it, need he govern himself in anywise with reference thereto.*" (Emphasis ours.)

The same Court, in the *Third National Bank* case reaffirmed the proposition that installment payments are by the contract left free that the contractor may use them in getting either material or labor. It is pointed out that whether he uses such payments to pay claims directly, or to repay one who temporarily advances the money for that purpose, "he does what is expected and that to which the surety has no right to object" (65 F. [2d], l. c. 550).

The unsatisfactory results of a rule contrary to the doctrine of these cases are obvious. Suppose a contractor incurs a hotel bill, a tailor bill or a bill for some other necessity or luxury, and tenders in payment money which his creditor knows came from the performance of a public works contract. Must the creditor refuse it, or take it clothed with an equity that, perchance, later permits it to be taken away from him for the payment of those who furnished labor or material under the contract? If so, it can only be said that no one outside a special class of

creditors may deal with such a contractor and look for financial satisfaction with certainty.

Without such undue regard for the rights of laborers and materialmen, they have the security afforded by the bond and also by the amounts expressly reserved for their protection, which security is not provided even to one, such as petitioner, who advances money that material and labor bills may be paid during the progress of the work. Should their rights be extended as here proposed, the lender is deprived of every prospect of reimbursement where the contractor's resources are limited. It is believed that the decisions of this Court, as well as those others which have recognized a lien in favor of laborers and materialmen in certain contract payments (or in favor of sureties by right of subrogation), furnish no support for such a theory, but, rather, refute it. Reference is made to:

Prairie State Nat. Bank v. United States, 164 U. S. 227;

Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404;

American Surety Co. v. Westinghouse Mfg. Co., 396 U. S. 133, affirming 75 F. (2d) 377 (C. C. A. 5);

Claiborne Parish School Bd. v. Fidelity & Deposit Co. (C. C. A. 5), 40 F. (2d) 577;

Pratt Lumber Co. v. Gill Co. (D. C. N. Car.), 278 F. 783;

Fidelity & Deposit Co. v. City of Auburn (Wash.), 272 Pac. 34;

Massachusetts Bonding & Ins. Co. v. Ripley County Bank, 208 Mo. App. 560, 237 S. W. 182;

U. S. Fidelity & Guaranty Co. v. Sweeney (C. C. A. 8), 80 F. (2d) 235;

Riverview State Bank v. Wentz (C. C. A. 8), 34 F. (2d) 419;

Exchange State Bank v. Federal Surety Co. (C. C. A. 8), 28 F. (2d) 485;
Farmers' Bank v. Hayes (C. C. A. 6), 58 F. (2d) 32;
Lacy v. Maryland Casualty Co. (C. C. A. 4), 32 F. (2d) 48;
Belknap Hardware Mfg. Co. v. Ohio River Contract Co. (C. C. A. 6), 271 F. 144.

Only in the four cases last cited were the equitable rights of sureties, who had paid material and labor claims, extended to both retained percentages and current estimates. In all four the contractors had defaulted their contracts and the work had been completed by the sureties (or, as in the *Belknap* case, by a receiver for the contractor). In all four, the funds held subject to lien remained unpaid, and in none was the lien extended to current estimates paid over to the contractor prior to his abandonment of the contract. For these reasons such cases lend no support to the decision here.

In the *Prairie Bank* case, the reasoning of this Court appears clearly to have been that the percentage to be retained by the United States until completion of the work constituted a *security* for the performance of the contract. It was the Government's right in that *security* to which the surety became subrogated upon fulfilling the contractor's obligation. As pointed out by the Court of Appeals for the Fifth Circuit: "The case has no application to money not reserved as a security but paid over to the contractor" [Kane v. First National Bank, 56 F. (2d) 534, at page 536].

While in the *Henningsen* case, as the court below points out (R. 161), the identity of the rights to which the surety was held subrogated upon payment of material and labor claims was not made entirely clear, the fact remains that

it was a balance remaining due and unpaid to which its rights attached. Moreover, this Court merely followed the decision in the Prairie Bank case, thus in effect reiterating the thought that the rights in the fund had their existence *because of the character of that fund as a security for performance and for payment of claims.*

Again, in *American Surety Co. v. Westinghouse Electric Mfg. Co.* (C. C. A. 5), 75 F. (2d) 377, affirmed at 296 U. S. 133, only the retained percentage was involved in the determination of equities as between laborers and materialmen and the surety.

It is thus seen that none of the decisions which have been discussed extends the rights either of a surety or of materialmen and laborers beyond the funds specifically reserved as security or those due and not paid over at the time of the assertion of such rights. Neither do any of the other decisions which might be cited. For the first time, in this case, it has been held that installment payments, though left free by the contract, yet are encumbered.

It has not been deemed sufficient that one class of creditors shall have the protection of a bond and the added security of funds reserved for their benefit. They have here been given further prior rights, but at the expense of one who, instead of labor or material, furnished money for the purchase of labor and material.

To thus increase the lender's risk is to increase inequality of rights.

The consequences of this decision, if not reversed, are apparent. No bank or other lender could with safety render a public works contractor financial assistance. Knowing that money to be collected on the contract and repaid may be subject to a prior encumbrance, will a

lender give such assistance? Will not many contractors be deprived of an opportunity to bid on public works, because of their inability to obtain financing? Will not the governments—federal, state and municipal—all be losers through lessened competition and increased costs? It would seem that these predictable results alone are reason enough for declining to add to the protection already given those who furnish labor and materials for these contracts.

It is urged that the decision sought to be reviewed and reversed is supported by neither authority nor reason nor considerations of policy. It is opposed by all three.

POINT C.

Passed without decision by the Court of Appeals was the ruling of the District Court that petitioner was a partner of the contractor and therefore was liable for material and labor claims and could not assert a claim superior thereto (R. 47).

This ruling was based upon the uncorroborated testimony of the contractor given at a time when he was endeavoring to support a claim to the fund adverse to that of Martin (R. 137-139), which claim on behalf of Edward Tobin, Sr., was found by the Court to be without substance and to have been collusively filed (R. 46). The effect of that testimony was merely that on an earlier contract the contractor had arranged to borrow money from Martin and to divide profits with him, and that such arrangement had "carried through the Carlinville job." At the same time he admitted that when the arrangement was made it was not understood to apply to the Carlinville contract, "because we did not have but the one job at the time" (R. 139).

It is not believed that this constituted proof of an agreement to divide anticipated profits on the Carlinville contract, but even construing it as such it falls far short of evidence of a partnership or of any other relationship, indeed, than that of borrower and lender.

As pointed out in *Meehan v. Valentine*, 145 U. S. 611, at page 624, it is now well settled that a lender of money is not a partner in any sense, even though he is to receive a part of the profits "in lieu of or in addition to interest." Cases not adhering to this rule are there distinguished by the statement that, "The person held liable as a partner furnished the whole capital on which the business was carried on by another, or else contributed part of the capital and took an active part in the management of the business."

Authorities in accord include: Annot. 18 L. R. A. (N. S.) 1055; 33 C. J. 847; Randle v. Barnard, 26 C. C. A. (7) 568, 81 F. 682; Darling v. Buddy, 318 Mo. 784; Darling v. Potts, 118 Mo. 506; Schumann-Heink v. Folsom, 328 Ill. 321.

POINT D.

Other reasons assigned by the District Court in ruling against petitioner's claim to the fund which are deemed material to this discussion but were not passed upon by the Court of Appeals were those stated in paragraphs VII-B and VII-C of the "Findings of Fact" (R. 47-48). It is there held that Martin, having written the bond as agent of the surety, "occupied the position of having notice and knowledge of the situation confronting Tobin, a notice and knowledge which neither the surety company nor the creditors of Tobin could have," and, further, that the execution of the power of attorney to Martin and

his collection of the funds due for completed work constituted a fraud upon the other creditors and the surety.

Neither the finding that Martin occupied a position giving him information not possessed by the others, nor the conclusion as to fraud apparently based thereon, can find support in the facts or the law applicable thereto.

Not only did Martin satisfactorily explain his reasons for executing the bond contrary to the advice of a vice-president of the surety (R. 114). It was affirmatively shown by the surety that it first learned of unpaid claims as early as October, 1932 (R. 84), but that Martin was not apprised of the situation until December, 1932, or later (R. 81, 82, 83, 95). It therefore cannot be said that petitioner's knowledge of approaching financial difficulties was superior or even equal to that of the surety, whose employes had checked up on outstanding bills as the work progressed (R. 82, 85), nor to that of the creditors themselves whose bills remained unpaid after presentation. Moreover, the actions which petitioner took for his own protection took place subsequent to the termination of his agency with the surety, and, in addition, they were wholly independent of and unrelated to any confidential interest attributable to him in connection with his former agency.

Under such circumstances there is nothing to substantiate a charge of fraudulent conduct based on breach of confidence or trust. There is no reason for holding that petitioner, after the severance of his relationship with the surety, could not negotiate freely for his own interest or act adversely to his former principal as fully as any other person. Robertson v. Chapman, 152 U. S. 673, l. c. 683; Dennison v. Aldrich, 114 Mo. App. 700, l. c. 709.

The advantage obtained by petitioner at the time of ob-

taining repayment of his loans was achieved simply by his prudence and exercise of vigilance, and not by reason of anything arising during his agency with the surety. In this connection no cause exists for depriving him of that advantage.

POINT E.

It is urged, finally, that the slur cast at petitioner as a purported additional reason for refusing allowance of his claim was totally unjustified and that this injustice should be reviewed and remedied. We refer to the District Court's finding that the claim of $10,405.65 filed by Martin as representing his account on the Carlinville contract included items advanced under the other contract, and its conclusion therefrom that he did not come into equity "with clean hands" (R. 48, par. E). Because it is felt that the charge of misrepresentation involved a lack of understanding of the facts, it is necessary that several portions of the record be referred to.

The basis of this "finding" was a deposition of Martin given in another case, wherein he had stated, in answer to a question as to why he had included in his "claim" in the National Surety Company case the item of $5,672 to cover bills on the Havana job, that: "I wanted to see them paid" (R. 142).

Both the question and answer, as well as the Court's conclusion therefrom, are patently based upon a misunderstanding as to the nature of the claim which had been filed by Martin and as to the evidence relating to the contractor's indebtedness to him. The items with respect to bills assumed and guaranteed by Martin on the Havana contract were clearly shown as such in the audited account which he himself caused to be prepared and placed in evidence (Martin's Exhibit N, R. 125). These were ex-

plained as constituting charges for "assumed bills" on the Havana job (R. 120), payment of which, by agreement with the Maryland Casualty Company, was to be made by Martin out of funds collected on that job (Martin's Exhibit M, R. 117). The account showing these items was not the basis of Martin's *claim*, however, and it was offered merely to give a statement of Tobin's account with Martin on *both* contracts more detailed and complete than the similar audit with respect to funds advanced on the Carlinville contract alone could give (Martin's Exhibit O, R. 125-127). In this separate audit report no charges were set up to cover any items other than those which, by the undisputed evidence, related only to the Carlinville financing. Martin's *claim*, filed pursuant to the Court's order, merely reflected this separate audit and was properly confined to Carlinville items (R. 34-38). Such claim did *not* include, and cannot be construed as attempting to include, any items involved in the other contract. The implication of misrepresentation in regard thereto was wholly unfounded, as shown above, and we repeat that the injustice committed should be corrected.

CONCLUSION.

At the expense of brevity, perhaps, a discussion of all points deemed material to a proper decision in the case has been undertaken. To accomplish this it was necessary to go beyond the single issue on the merits decided by the Court of Appeals. This was done that this Court might immediately be apprised of the several questions present, all of which petitioner is prepared to meet. It is earnestly hoped that this Court may see fit to consider a review of them all, that a troublesome litigation may thus be terminated.

In urging the several issues, however, it is not intended that the extreme importance of the single issue decided by the Court of Appeals be obscured. That question, it is respectfully urged, requires authoritative clarification. As the court below itself says (R. 162): "This is important to those furnishing labor and material for public works as well as those called upon to make loans to contractors to carry on such work."

As the matter stands on the decision below, neither such contractors nor those called upon to make such loans are left free to deal with any payments coming into their hands for completed work. If the announced doctrine be sound, then no title may be asserted or relied upon in any payment made at any time when bills remain unpaid, except one in recognition of superior rights of a thrice-protected class of creditors. That is the issue squarely presented by the decision here.

Petitioner most respectfully submits that this case, in view of the nature of that issue and of the manner of its determination, is one urgently calling for the issuance of a writ of certiorari and for a review and reversal of the decision of the Court of Appeals.

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Counsel for Petitioner.

Of Counsel:
RICHARD S. BULL.

FEB
CHARLES E

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 500.

GUY S. MARTIN,
Petitioner,

v.

NATIONAL SURETY COMPANY, a Corporation, et al.,
Respondents.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF ON THE MERITS.

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I.

SUMMARY OF ARGUMENT.

A.

Upon payment by the Government of funds due the contractor as progress payments for completed work, such funds were freed of any lien or equitable right such as might exist in funds reserved or retained, and such payment did not constitute a mere assignment.

B.

The circumstances urged by respondents did not by operation of law create a partnership between the contractor and petitioner. A partnership is created only by agreement.

C.

No trust for the benefit of laborers and materialmen was created in the fund collected by petitioner.

D.

The preference given to petitioner by the exercise of the power of attorney given him by the contractor did not constitute a fraudulent conveyance.

II.

ARGUMENT.

POINT A.

In the brief filed in support of the petition for writ of certiorari a terse discussion was attempted, under points A and B of the argument, the aim of which was to show that the dominant authority on the issue presented is opposed to the opinion of the Circuit Court of Appeals in this case, and that the other decisions which might be relied upon by respondents are distinguishable in fact and in principle. It is petitioner's intention at this place merely to consider briefly a few of the typical cases relied upon under points A and B of respondent's brief on the merits, which were not specifically dealt with in our original brief.

In *Belknap Hdw. Mfg. Co. v. Ohio River Contract Co.*, 271 F. 144, the fund in which equitable priorities were allowed were those collected by a *receiver* for the contractor for completion of the work. In *Exchange State Bank v. Federal Surety Co.*, 28 F. (2d) 485, the surety completed the work and, upon payment of claims, was held to have an equitable lien superior to the assignment obtained by a bank which had loaned money, *but in funds not paid over by the county to the contractor or applied by him in discharge of debts.* In *Farmers' Bank v. Hayes*, 58 F. (2d) 32, construed by respondents in their brief on the merits, at pages 25-26, as holding that the equitable lien of the surety extends not only to the reserved percentage, "but also to all other sums that have accrued under the contract," not only had the surety been obliged to arrange for the completion of the contract, *but the funds involved*

were still retained. The rule is thus limited, as shown from a portion of the opinion as quoted by appellees:

> "Whether the lien of the surety extends only to the reserved percentage under the contract, and retained by the owner, or also to sums earned under the contract, *and retained by the owner,* is a question which has frequently been raised. We think it is now settled that it extends to both." (Our emphasis.)

In *Lacy v. Maryland Casualty Co.,* 32 F. (2d) 48, also quoted by appellees at page 27, the very language of the opinion immediately following the portion quoted shows that the rule contended for does not apply to moneys already paid over, but only to those unpaid when the rights of the lien or of subrogation are sought to be enforced (l. c. 51):

> "The equity arises because of the obligation of the surety to perform the contract of the principal. Upon his performance of this contract, equity subrogates him to all rights of the obligee as against the principal. Now, the obligee, upon default of the principal, is without doubt entitled to apply all moneys *unpaid* so far as necessary to reimburse his loss. If the surety, instead of performing the contract, elects to pay damages, it can be held for no more than the amount which the obligee is compelled to pay to complete the work over and above the amount which it has on hand at the time of the principal's default, for this is all the damage that the surety sustains. But, when this happens, the surety receives the benefit of the *unpaid* current estimates as well as the retained percentages." (Our emphasis.)

The foregoing analysis demonstrates that in none of these cases were the equities of the surety or of contract creditors so elevated and enforced as to deprive another

credit of the funds already paid over and applied to the discharge of the debt due him, where such funds consisted of progress payments collected for work performed by the contractor.

Other cases cited by respondents which may be mentioned briefly as refuting rather than as supporting their contentions include:

In re P. M'Garry & Son (C. C. A. 7), 240 Fed. 400. Basing its ruling upon the principle that sums ***withheld*** under the terms of a contract constitute a reserve or security set up for the protection of a certain class of creditors, the Court treated a fund in the hands of a trustee for a bankrupt contractor as charged with the same equities "as when it was *undistributed* in the hands of the United States" (l. c. 402). The plain inference is that progress payments not withheld but paid over would, at least after such payment, be discharged of all equities in favor of any special class of creditors.

Glades County v. Detroit Fidelity & Surety Co. (C. C. A. 5), 57 Fed. (2d) 449. Cited as supporting the surety's equity of exoneration, this case also deals with funds still owing and unpaid to a contractor at the time of his becoming bankrupt. Here again the reasoning of the Court is opposed to the view that the equitable lien contended for extends to funds earned and paid and which did not comprise a part of the security, for in speaking of such security it was said (l. c. 452):

> "Such a fund is the *reserve* on a building contract • • • Prairie State Bank v. United States, though a case of subrogation, clearly indicates the status of the reserved payments as a fund for the security both of the obligee and the surety on the bond."

Philadelphia Nat. Bank v. McKinlay (U. S. C. A. for D. C.), 72 F. (2d) 89. Respondents have particularly directed the Court's attention to this case, one wherein both the contractor and the surety had become bankrupt. The decision fully supports petitioner's contentions, for it was expressly ruled, in passing upon claims to funds remaining in the Government's hands, that (l. c. 91):

> "• • • those persons who furnish labor and do work on a government project have an equitable lien on the fund, for the payment of their work and labor, *until the fund is paid to the contractor.*" (Our emphasis.)

That the distinguishing fact of completed payment, present in the instant case, is misunderstood or misinterpreted by respondents, is indicated not alone by their reliance upon such decisions as those which we have hereinbefore discussed. We refer to their insistence, at page 32, and again at page 38 of their brief on the merits, upon the importance of the provision in the contractor's application for bond to the effect:

> "that the applicant had not assigned and would not assign his payment on this contract or any part thereof" (R. 89).

It may be mentioned in passing that an *assignment* to Martin of payments to become due under the contract would have been void because of the provisions of 31 U. S. C., sec. 203. The Circuit Court of Appeals correctly ruled that by virtue of these provisions the surety had no valid assignment of the progress payments collected by Martin (R. 159), and the same ruling would, of course, apply to any other assignment by the contractor not conforming to the requirements of the statute. It is no an-

swer to argue, as do respondents, that the assignment to the surety made by the contractor in his application for bond brought no new parties into the situation. Being a voluntary assignment, it is not within the exceptions recognized in *Spofford v. Kirk*, 97 U. S. 484, and *National Bank of Commerce v. Downie*, 218 U. S. 345.

The point here, however, is that the collection by Martin of the funds due under the December and January estimates, *after their allowance*, did not constitute an assignment such as was the subject of the covenant contained in the contractor's application, nor did the power of attorney exercised by Martin. The means of collection employed were the same, in legal effect, as though the contractor himself had received payment when due and had then turned over the funds to his creditor, Martin. As in those funds there were no sums reserved as additional security for performance or for payment of claims, they were freed, when paid over by the Government, of any lien or equitable right that might have attached had they been retained. Certainly, if the contractor himself had procured their receipt and thereafter had made distribution to certain favored creditors, such distribution would not be considered an "assignment" of a payment on the contract within the meaning of the term in the bond application. (Nor could such creditors be pursued and sued, in the absence of a showing in bankruptcy of a preference.) Considering the true nature of the funds in dispute and of their collection and application, it is believed that the assertions by respondents as to the validity of assignments are beside the point. The same may be said also of those decisions, among them many cited both by petitioner and respondents, which establish the priority of a surety's claim over one based merely upon an executory or inferior assignment.

It is submitted that upon analysis of the arguments and decisions relied upon by respondents, under their points A and B, no reason and no precedent is revealed in support of the one issue as decided in the opinion below. Petitioner asserts that, for the reasons and on the precedents discussed in his original brief, that opinion is erroneous and should be reversed.

POINT B.

Approximately twelve pages of respondents' brief (pp. 44-56) are devoted to a discussion of the record and of authorities in an effort to establish the existence of a partnership between Tobin, the contractor, and Martin, who loaned him money. Apparently it is realized that the evidence shows no agreement between the two to create a partnership, for stress seems to be given to what respondents urge as circumstantial evidence. Indeed, there was no agreement whatever other than that mentioned by Tobin as an arrangement whereby, in entering upon an earlier contract, he was to borrow money from Martin and to share profits with him.

Respondents urge that the existence of a partnership is a question of fact and may be proven by circumstances, but in so doing they fail to recognize the principle that the relationship is dependent upon an agreement, which, in turn, is a matter of intention.

Conceding for the argument, therefore, the truth of Tobin's testimony and viewing all the circumstances dwelt upon by respondents at such length, there is nothing indicating any relationship other than one of creditor and debtor. Martin at no time directed operations under the contract, or assumed any control even over expendi-

tures, other than to undertake to see some bills paid. He was never held out to anyone as a partner, and at no time does it appear that credit for labor or materials was extended with an understanding that anyone other than the contractor and his surety were responsible. The case then remains squarely within the principles announced by the authorities we have previously cited.

In *Meehan v. Valentine*, 145 U. S. 611, where the effect of the agreement (there in writing) is virtually identical with that asserted here, it was said (l. c. 625):

> "Throughout the original agreement and the renewals thereof the sum of $10,000 paid by Perry to the partnership, and for which they gave him their promissory notes, is spoken of as a loan, for which the partnership was to pay him legal interest at all events, and also pay him one-tenth of the net yearly profits of the partnership business if those profits should exceed the sum of $10,000. The manifest intention of the parties as apparent upon the face of the agreements, was to create the relation of debtor and creditor, and not that of partners. Perry's demanding and receiving accounts and payments yearly was in accordance with his right as a creditor. There is nothing in the agreement itself, or in the conduct of the parties, to show that he assumed any other relation. He never exercised any control over the business. The legal effect of the instrument could not be controlled by the testimony of one of the partners to his opinion that 'it was capital he had in the business the same as ours; we owed it to him; of course, we owed it to him if we did not lose it.'"

To the foregoing need only be added a reference to the fact that the text-writers have joined this Court in its determination that while proof of an agreement to share

profits is evidence of an intention to form a partnership, yet such proof is neither conclusive nor, of itself, even sufficient on the question of intention. As said by Prof. Gilmore in his work on Partnership, Sec. 11, p. 31:

> "The case of Cox v. Hickman, as finally understood, effectually dispelled the notion that participation in profits made a partnership by operation of law as to third persons."

See, also, Lindley on Partnership (9th Ed.), p. 46.

It must be concluded that the matters urged by respondents as indicating the existence of a partnership fall far short of showing an agreement creating one. Circumstances cannot substitute for intention, and as no intention to bind themselves together as partners appears from the relationship between Tobin and Martin, such contractual status does not arise by mere operation of law.

POINT C.

It is desired to reply briefly to the contention advanced by respondents under their point E. There it is asserted that the funds collected by Martin were impressed with a trust for the benefit of laborers and materialmen, because of an agreement that such funds would be first applied to the payment of their claim.

In this connection respondents quote a single sentence from Martin's testimony to the effect that when he received authority to collect the funds Tobin had said, "there were going to be some bills to pay and he wanted me to handle the funds" (Brief, pp. 60-61), and respondents then argue:

> "Although Martin's subsequent testimony about the purpose of the power of attorney varies from the foregoing, the trial court chose to believe his admission against interest, and to disbelieve his other explanations to the effect that the power of attorney was given him to repay his loan."

We find nothing in any of the trial court's findings or conclusions to indicate that by the collection of the money Martin became a trustee for the benefit of other creditors, nor do respondents cite any authority giving that effect thereto.

Furthermore, the one bit of testimony quoted does not reveal the true situation. Immediately following the part quoted by respondents it was said by Martin (R. 99):

> "I was willing to handle the funds because I wanted my money back, and I wanted to see that the bills were paid. At that time he owed me approximately $8,200.00."

That was at a time, in December, 1932, it must be noted, when the bills outstanding, so far as either the surety or Martin knew, amounted to no more than $8,000 or $9,000, while there was approximately $16,000 owing on the job to the contractor (R. 81-83). This amply explains the feeling entertained by Martin that the funds would be sufficient to pay all claims, including his own, if he were given some control, even jointly with the surety. Continuing with the testimony, above quoted, Martin said (R. 99):

> "I think I advised Mr. Hauck (adjuster for the surety) either that I had the power of attorney or that Mr. Tobin would give it to me. I am not sure that I notified Mr. Hauck that I had received it. I did not notify him that I had sent it in to the Treasury Department; I was under no obligation to do so. I was

interested in seeing these accounts paid, and I wanted to work with the National Surety Company to that end, and so told Mr. Hauck. • • •

"I did telephone to you, Mr. Mayne, before I went to Washington in January of 1933, and said that I was ready to work with the National Surety Company provided I could have joint control of these funds with them, and you told me that was not acceptable and that you would have to proceed to enjoin the collection of these funds, and at that time I had the power of attorney. I received these estimates from Mr. Tobin for the January and December payments, which he secured from the engineer, either the day I left here for Washington or the day before. I did not know at that time that Tobin was in your office and that he told you he would secure that power of attorney for you and enter into the joint control. I did not advise you in that telephone conversation that I intended to go to Washington to get this money. I did not know at that time that I was going to Washington because I did not know that Mr. Tobin would give me the estimates. I went to Washington instead of mailing the estimates because I had considerable money at stake there; I wanted to protect myself."

With this evidence in mind, it cannot be said that a trust in the funds collected was established, or that any obligation existed in Martin other than to account for any excess over the amount of the debt owing to him.

POINT D.

In their brief on the merits, respondents advance the contention that the power of attorney under which petitioner Martin collected the funds due from the Government and applied them in payment of the contractor's indebtedness constituted a conveyance which was fraudulent and

void (Brief, Point F, pp. 60-63). Reliance is there placed upon Revised Statutes of Missouri 1929, Secs. 3116 and 3117.

This contention may be refuted by a brief reference to the facts and to decisions construing and applying the cited statutes.

It may first be noted that Martin asserted no right under the power of attorney to collect any further sums than the $10,448.10 which he received, as in his answer he renounced any claim upon the funds remaining due under the contract and conceded that such funds, constituting the deferred payment and retained percentage, were properly subject to an equitable claim and lien by the surety (R. 23).

Attention may then be directed to the undisputed evidence which was that, when Martin applied the sum received, the contractor was indebted to him in approximately the same amount. Based upon aggregate indebtedness, including items which Martin had assumed and for which he was responsible, the contractor, after application of the $10,448.10, still owed $1,482.40 to Martin (Exhibit N, R. 121-125 and R. 130). Based upon the Carlinville account alone, there was then a credit balance in favor of the contractor of $42.45 (Exhibit O, R. 125-127, and R. 130), and this amount Martin agreed he was not entitled to retain (R. 24-25).* From the evidence, the District Court found that when the work was nearing completion, the contractor "was indebted to defendant Martin in a sum in excess of $10,000.00 for money loaned" (R. 28).

In such situation the power of attorney employed by Martin to obtain payment does not, if regarded as an assignment, come under the ban of the Missouri statutes or decisions as fraudulent. As pointed out by Judge Booth, in *Hale v. Hummel* (C. C. A. 8), 64 F. (2d) 210, l. c. 212: "Under decisions of the courts of the State of Missouri,

the burden of proof is upon the party alleging a fraudulent conveyance to make out in the first instance a prima facie case." Further, it was there made clear that an antecedent debt is a sufficient consideration (l. c. 213), and the Missouri cases cited leave no room for the contention made here by respondents. Thus, in *Wall v. Reedy*, 161 Mo. 625, the state Supreme Court stated (l. c. 637):

> "It may be regarded as entirely settled in this state that a debtor may prefer one creditor over another by direct payment or transfer of property, providing the property is taken in satisfaction or assumption of a just demand, and not as a mere screen to secure the property to himself."

Also, at page 649:

> "The effect of any preference sought means, of necessity, that some other less fortunate creditor is to be hindered and delayed in the collection of his debt, and upon what principle the knowledge of that fact by the preferred creditor or the further knowledge on his part that the debtor intended that the transaction should have that effect, should operate to avoid the transaction, it is difficult to conceive. Where the right of preference, as in this state, is recognized, we cannot see how it is possible for one creditor, who gets nothing more from the debtor than sufficient to pay off, discharge or settle his just claim, to commit a fraud against the rights of other creditors, or how he can be said to have participated with the debtor in the commission of a fraud."

To the same effect see *Gust v. Hoppe*, 201 Mo. 293, l. c. 300; *Meyer Bros. Drug Co. v. White*, 165 Mo. 136, l. c. 142.

It is submitted that in the light of the foregoing there is no basis for respondents' reliance upon the principles applicable to fraudulent conveyances.

CONCLUSION.

While respondents in their brief on the merits have raised some other questions in addition to those specifically dealt with in this reply, it is considered that they either are but side issues the disposition of which is accomplished by the points made herein, or that they are completely answered by our brief filed with the petition for certiorari and in support thereof. Reference in this connection is made to the following of respondents' points: Point D, treating with the petitioner's relationship as agent for the surety, which was terminated prior to his assertion of any adverse rights and upon which such rights were in no way dependent; point G, containing assertions of fraudulent conduct on the part of Martin; and point H, under which it is argued that Martin did not "come into equity with clean hands." What was said in our original brief under points D and E, it is believed, fully serves as an answer to and refutation of those contentions.

Concurring in the apparent plea of respondents that the entire case be considered here and all issues necessary to a final determination be decided, petitioner respectfully submits that the decrees below should be reversed and that judgment or appropriate directions be given for the establishment of petitioner's rights and claim.

Respectfully submitted,

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Counsel for Petitioner.

RICHARD S. BULL,
Of Counsel.

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CHARLES ELMORE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 500.

GUY S. MARTIN,
Petitioner,

v.

NATIONAL SURETY COMPANY, a Corporation, et al.,
Respondents.

RESPONDENTS' BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

RESPONDENTS' BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT.

Most of the facts are sufficiently summarized in the opinion of the Circuit Court of Appeals found at pages 154-162 of the record. The findings of fact of the trial court following the hearing on the merits of the issues joined by the amended bill of complaint and the amended answer of defendants Guy S. Martin and A. C. Tobin, which are found in the record at pages 26-28, and the

findings of facts of the trial court following the last hearing in the cause at which the various claims of laborers and materialmen and of the petitioner Martin, were heard and adjudicated, appearing in the record at pages 43-49, will also be found enlightening.

We add the following additional facts. Petitioner Guy S. Martin was an agent with authority to execute surety bonds on behalf of the National Surety Company (plaintiff below) in the early part of 1932, when the matter arose of executing a construction bond for A. C. Tobin & Company, a construction company engaged in the erection of federal public works. Martin had been having quite a bit of dealings with A. C. Tobin of said construction company (R. 105), which were described by Tobin as follows:

> " 'My arrangement with Mr. Martin started back at the beginning of the Havana Post Office job. At that time I was the low bidder and Mr. Martin wrote the bond; my financial standing was weak. While there was nothing in writing, it was agreed that if I needed funds at any time, I could get a lift from Mr. Martin. In return for that, at the completion of the various jobs, the profits were to be divided on a 50-50 basis. That arrangement commenced on the Havana job and carried right on through the Carlinville job' " (R. 138).

Martin's prior dealings with Tobin were in his individual capacity and not as representative of the National Surety Company. The vice-president of the National Surety Company, upon hearing that his company was considering executing Tobin's bond on the Carlinville Post Office job, which is involved in this litigation, expressly instructed petitioner Martin not to execute such bond on behalf of the National Surety Company, but Martin violated those instructions and bound and obligated the Na-

tional Surety Company on the bond in spite of the vice-president's instructions not to do so (R. 80).

In conjunction with this matter, Martin, as agent for the Surety Company, had the contractor, Tobin, execute a written application for such surety bond, wherein it was expressly warranted **"that the applicant (Tobin) has not assigned and would not assign his payment on this contract or any part thereof"** to anyone (other than the National Surety Company) (R. 89). Said application also contained an assignment by the contractor to the Surety Company, of all the deferred payments as well as the retained percentages (R. 91).

In the fall of 1932 the contractor was getting into financial difficulties and defaulted in making payment of the accruing labor and material bills (R. 84, 85). In December, 1932, the Surety Company demanded joint control of the balance of the funds due from the Government (R. 107). The date of this demand was December 20, 1932 (R. 83). The contractor, Tobin, advised the Surety Company that he wanted to see his attorney about executing the power of attorney given to him by the Surety Company for that purpose. However, instead of executing and returning the power of attorney, Tobin took it to Martin (R. 108). The next day, December 21, 1932, Martin procured a new power of attorney, executed by Tobin to Martin (R. 99, 101). Martin also prepared a letter to the Treasury Department, which Tobin likewise signed, directing that all of Tobin's checks be forwarded to petitioner, Guy S. Martin (Exhibit H, R. 117). On December 28, 1932, Martin forwarded the power of attorney and the letter written by Tobin to the Treasury Department (R. 117).

Between December 20, 1932, and February 6, 1933, when Martin actually collected the money from the Government, various officials of the National Surety Company had conferences with Martin concerning the difficulties that had

arisen by virtue of the contractor's nonpayment of labor and material bills (R. 81-83). Martin at all times concealed the fact that he had said power of attorney and that he claimed to have money due him on account of loans made to the contractor, Tobin (R. 82, 83). The contractor, Tobin, like Mr. Martin, also actively misrepresented and concealed from the Surety Company the true facts with respect to having executed a power of attorney in favor of Martin and with respect to the fact, if it be a fact, that Tobin owed Martin any money (R. 86, 87, 108).

While Martin's explanations of the purposes of the power of attorney, which was executed in his favor, are not without conflict, his first statement under oath about the matter, is as follows:

> "When he (Tobin) gave me the power of attorney he said **there were going to be some bills to pay and he wanted me to handle these funds**" (R. 99).

The time specified in the Government contract for the completion of all work on this particular job was January 18, 1933, and a penalty of thirty-five dollars ($35.00) per day was provided for failure to complete the building on time (R. 79). It was not until February 6, 1933, that petitioner Martin collected the money in question from Washington (R. 96) as a result of the hurried trip which he made in secrecy even from Tobin's attorneys (R. 86, 87, 101, 108), who appeared in this case as Martin's attorneys about ten days later (R. 16). The Circuit Court of Appeals found that the moneys which Martin collected and which are involved in this case are payments which were made to him as attorney in fact for the contractor, after completion of the contract. That Court further found that Martin had full knowledge of all of the facts in connection with this entire matter (R. 161).

II.

ARGUMENT.

Not only do the rules of this Honorable Court provide: "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefor" (No. 38 of the Revised Rules of the Supreme Court of the United States). But also in the case of **Furness, Withy & Company v. Yang-Tsze Insurance Association, Ltd., et al., 242 U. S. 430**, this Court directed the attention of the members of the bar to the fact that a duty rests not only upon counsel for petitioner, but also upon counsel for respondent, to give this Court all information available that will assist it in determining the appropriateness of the relief prayed for to the facts of the case at hand. We address ourselves to the discharge of that duty.

Petitioner suggests three reasons why this Court should allow a writ of certiorari in this case (Petition for Writ of Certiorari, page 8). The third of these reasons, to wit, that the Circuit Court of Appeals herein has decided the case in a way probably in conflict with applicable decisions of this Court, has not the slightest semblance of merit. See **Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404; Prairie State Bank v. United States, 164 U. S. 227,** and **American Surety Company v. Westinghouse Manufacturing Co., 396 U. S. 133.**

The second reason suggested is that an important federal question has been decided by the Circuit Court of Appeals, which should be settled by this Court. Such suggestion is not persuasive when we consider the time that this Court has already devoted to a consideration of

the equitable rights of sureties and of laborers and materialmen arising under the Hurd Law (see cases last cited, supra). In the Henningsen case this Court held that the surety on the contractor's bond who had paid the claims of laborers and materialmen became thereby subrogated to an equity in the funds due from the Government under the contract. Such equitable rights were held to be superior to the rights of a bank holding an assignment from the contractor to secure moneys loaned. The opinion in that case states:

> "Whatever equity, if any, the bank had to the fund in question arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles, entitled to assert the equitable doctrine of subrogation, but it is equally clear that the bank was not, for it was a mere volunteer, and under no legal obligation to loan its money."

Judge Denison of the Sixth Circuit, in the case of **Belknap Hardware and Manufacturing Company et al. v. Ohio River Contract Company et al., 271 Fed. 144,** has made the following careful analysis of the basis of this Court's decision in the Henningen case, to wit:

> "It may fairly be assumed, we think, that there was some general recognition of this moral or ethical duty resting upon the United States, and that this led to the passage of the Bonding Act of 1894. The policy of the act may be thought of in two ways. It may have been the congressional intent to substitute this statutory bond, as a protection to laborers and materialmen, in place of the rather vague obligation, which had been to some degree assumed by the United States, to look after their interests, in which case this obligation was eliminated, and after the statute, there

was no such duty resting on the United States and no such right to protection remaining in the laborers. It may have been the congressional intent to give to these claimants, by this bond, an additional protection, which would become the ordinary and primary one, and usually would be sufficient, and to do this without diminishing the obligation of the Government to see that these claims were paid, as far as that result could be accomplished by the funds which it retained. In that event the equitable priority of such claimants in the fund, if such priority there had been, would remain and could be enforced in the appropriate cases either directly or by subrogation.

"It is not necessary to consider which of these views would seem the better one, if the question were open. We think it has been foreclosed by the decision of the Supreme Court in Henningsen v. U. S., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547."

• • • • • • •

"The surety's claim of priority in the fund was sustained, and this was done on the stated theory of subrogation. **Since there cannot be the transfer of a right by subrogation, unless there is a right to be transferred, we think the necessary effect of the decision is to hold that the laborers and materialmen, in spite of or in addition to the giving of the bond, had an original and continuing equitable priority in the fund**, and that it was this right to which the surety was subrogated. This is not stated in the opinion in very express terms, but it had been pressed upon the Court (208 U. S. 407, 408, 28 Sup. Ct. 389, 52 L. Ed. 547) that there could be no such subrogation without such a right, and that there was no such right. On page 410, of 208 U. S., on page 391 of 28 Sup. Ct. (52 L. Ed. 547), the Court refers to and assumes that the Government, after the bond was given, was still charged

> with 'equitable obligations to see that the laborers and supply men were paid.' We are constrained to think that the decision necessarily rests upon the existence of this right, as one entitling these claimants to priority in payment out of the fund, and therefore as entitling the surety, as their equitable assignee by subrogation, to the same priority."

Not only has this Honorable Court thus recognized the existence of the equitable lien of laborers and materialmen under the Hurd Law by its decision in the Henningsen case, supra, but it has reaffirmed its views on this matter in the following excerpt from the opinion from Mr. Justice Cardozo, speaking for this Court in the case of **American Surety Company v. Westinghouse etc.**, supra:

> "Through the bond and the statute a new relation has been established with a new set of equities not subject to destruction at the pleasure of the principal (contractor). The integrity of that relation is in the keeping of the law.
>
> "We have on occasion to consider to what extent the creditors of the bankrupt not covered by the bond are affected by **the equities of creditors so covered** or by those of the petitioner, with the result that their claims are to be held subordinate thereto. Cf. Prairie State Natl. Bank v. U. S., 164 U. S. 227, 41 L. Ed. 412; Henningsen v. U. S. F. & G. Co., 208 U. S. 404, 52 L. Ed. 547."

The only remaining reason relied on for the allowance of the writ is that the opinion and decision of the Circuit Court of Appeals in the instant case creates a conflict with decisions of other Circuit Courts of Appeal on the same matter. Petitioner's able counsel, after their usual exhaustive search of the authorities, have cited four cases

upon which they predicate their suggestion that the decision in the instant case is in conflict "with decisions of other Circuit Courts of Appeal in the same matter." **Not a single one of those cases involves a federal public works.** It appears from the cases relied on by petitioner that they arose on public works under the various state statutes.

The case of **Fidelity & Deposit Company v. Union State Bank, 21 Fed. (2d) 102,** relied on by petitioner, was decided by the **District Court** in Minnesota. The basis of the decision is set forth in the opinion as follows:

> "It is equally well settled, **at least in the State of Minnesota,** that where payments are made to a public contractor unconditionally, under a contract such as is involved here, he can use the money so paid in any way he desires, and the payment is not subject to any equity. **Jefferson v. Church of St. Matthew,** 41 Minn. 392, 43 N. W. 74; Miller v. Shepard, 50 Minn. 268, 52 N. W. 894; Board of Commrs. of Redwood County v. Citizens' Bank, 67 Minn. 236, 69 N. W. 912; American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014; Villaume Box & Lumber Co. v. Condon, 146 Minn. 156, 178 N. W. 492; Standard Oil Co. v. Day, 161 Minn. 281, 201 N. W. 410, 41 A. L. R. 1291."

The case of **Maryland Casualty Company v. Board of Water Commissioners, 66 Fed. (2d) 730,** relied on by petitioner, relates to a public works of the City of Dunkirk, New York. It does not involve a federal public works or any question of the equitable rights that may arise under the federal statutes. The basis of the decision in that case appears to have been that when the bank collected the money in question from the municipality on its assignment from the contractor, "it was twenty days before a

default was declared by the Board. The Bank had no notice of the prior **unrecorded assignment** to the surety, and therefore we see no basis for asserting that the surety had a prior equity in payments due to Loyd under the terms of the contract." From this statement of the Court, it may be assumed that some provision is made under the statutes of the State of New York for the **recording** of assignments such as the surety predicated its rights on in that case; and the surety's **failure to record its assignment** was the basis of its loss of right.

The two remaining cases relied on by petitioner, to wit, **Kane et al. v. First National Bank of El Paso, Tex., 56 Fed. (2d) 534,** and **Third National Bank v. Detroit Fidelity & Surety Co., 65 Fed. (2d) 548,** were each decided by Judge Sibley of the Fifth Circuit. The former involved a contract with a school district under the state laws of Texas and the latter involved a contract with the State Highway Department of Florida. In the Kane case progress payments were **actually paid over to the contractor** and by him deposited in the bank to whom he owed money, **long prior to the completion of the contract** and prior to any default by the contractor; whereas, **in the instant case the funds in question are moneys that remained in the Government's hands after the completion of the contract.** The contractor, Tobin, was then insolvent, and the unpaid claims of laborers and materialmen on the job in question totalled about twenty-five thousand dollars ($25,000.00) (R. 50-53). The trial court and the Circuit Court of Appeals held that Martin had knowledge of all of the facts (R. 161).

In the Third National Bank case, supra, relied on by

petitioner, the Court expressly found the **surety company not only knew of the bank's assignment, but acknowledged it, and was therefore estopped to assert its prior lien (65 Fed. [2d], l. c. 550).**

Admittedly there are statements in Judge Sibley's opinions in the two cases last cited from the Fifth Circuit, which tend to support petitioner's contention that the lien of the surety company is limited to the retained percentage. However, in the most recent case in which the United States Circuit Court of Appeals for the Fifth Circuit has considered the question of equitable liens in connection with a federal public work, the majority opinion (from which Judge Sibley dissented) states:

> "It appears from decisions referred to below that the Government's observance of that duty in practical and effective ways, was the precursor of judicial recognition of an enforcible, equity right of unpaid furnishers of labor or materials for that work in or to a part of the contract price thereof remaining in the possession of the Government after the completion of that work by the contractor" (American Surety Company v. Westinghouse Electric Manufacturing Co., 75 Fed. [2d] 377, affirmed by this Court in 296 U. S. 133).

It therefore appears that the last decision from the Fifth Circuit is in accord with the decision in the instant case.

In conclusion, respondents respectfully urge that the disposition made of this case by the District Court and affirmed by the Circuit Court of Appeals is in accordance with sound reason and the justice of the case.

We ask, therefore, that the petition for a writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 500.

GUY S. MARTIN,
Petitioner,
v.
NATIONAL SURETY COMPANY et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

RESPONDENTS' BRIEF ON THE MERITS.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 500.

GUY S. MARTIN,
Petitioner,
v.
NATIONAL SURETY COMPANY et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

RESPONDENTS' BRIEF ON THE MERITS.

I.

OPINIONS OF THE COURTS BELOW.

The District Court filed no opinion in the case. The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported at **85 Fed. (2) 135**, and is found in the record at pages 154-162.

II.

JURISDICTION.

(a) This cause is pending here on Writ of Certiorari granted by this Court on December 7, 1936, upon authority of Judicial Code, Section 240, as amended (28 U. S. C., Sec. 347a).

(b) The judgment of the Circuit Court of Appeals became final on August 17, 1936 (R. 162).

(c) The Circuit Court of Appeals affirmed the decision of the District Court in favor of respondents, upon the single point that laborers and materialmen on a federal public work have an equitable right to payment out of funds remaining due the contractor upon completion of the contract and that such rights are superior to those of a subsequent assignee of the contractor who, at best, was a general creditor; and that the surety on the contractor's bond had the right to have the money thereafter collected by such assignee from the Government applied to the payment of claims for which the surety would otherwise be liable (the contractor having become insolvent) and which, if paid by the surety, would give it a superior right to the funds by reason of subrogation. The Circuit Court of Appeals deemed it unnecessary to consider the other points raised by respondents by way of additional reasons for affrming the decree below (R. 162).

III.

STATEMENT OF FACTS.

The opinion of the Circuit Court of Appeals (R. 154-162) suffices as an outline of the material facts. For the convenience of the Court we restate the facts and add additional facts that appear to be of controlling importance in support of the findings and decrees of the courts below.

Petitioner Martin was an agent with authority to execute surety bonds on behalf of the National Surety Company (plaintiff below), in the early part of 1932, when the matter arose of executing a construction bond for the contractor, A. C. Tobin. In addition to his connection with the National Surety Company, Martin at that time was engaged with the contractor, Tobin, in a private venture for profit, which was described by Tobin as follows:

> "My arrangement with Mr. Martin started back at the beginning of the Havana post office job. At that time I was the low bidder, and Mr. Martin wrote the bond; my financial standing was weak. While there was nothing in writing, it was agreed that if I needed funds at any time I could get a lift from Mr. Martin. In return for that, at the completion of the various jobs, the profits were to be divided on a 50-50 basis. That arrangement commenced on the Havana job and carried right on through the Carlinville job" (R. 138).

Tobin expressly testified, in answer to the question of whether or not he had a silent partner on the Carlinville job (involved in this case), that there was an arrangement between himself and Guy S. Martin that if he (Tobin) was short of money he was to draw on Martin and Martin was to help him out from time to time, and if, at the conclusion of the job, there was a profit, that they were to split

the profit (R. 137). Tobin further expressly testified that the arrangement with Martin was that he was to be repaid for the moneys advanced by him only after the contractor had first paid all of the laborers and materialmen (R. 141). Martin's own evidence established that during the construction of the Carlinville post office the contractor, Tobin, was authorized to sign checks against Martin's bank account (R. 96). While Martin denied having a partnership arrangement with Tobin and claimed that he was merely a money lender, nevertheless he made the following significant admission:

> "I don't believe that we agreed upon any rate of interest in connection with the Tobin jobs for which I was furnishing money" (R. 143).

Numerous other significant facts relative to the partnership, found by the trial court to exist between Tobin and Martin (R. 47), will be referred to later in the argument.

When the question of executing the construction bond on the Carlinville post office arose, the National Surety Company had no knowledge of Martin's relations with the contractor Tobin, but when the vice-president of the National Surety Company heard that his company was considering executing Tobin's bond on this job, he expressly instructed his agent, Martin, petitioner herein, not to execute such bond on behalf of the National Surety Company (R. 80). Martin violated those express instructions of an executive officer of the company by whom he was employed, and executed the bond on behalf of the National Surety Company (R. 92).

Tobin's contract with the Government (R. 87-88) required him to perform all of the work required for the construction of the Carlinville post office and to furnish all labor and materials. It was executed pursuant to the pre-

visions of the statute (Act of August 13, 1894, Chap. 280, 28 Stat. at L. 278; Act of February 24, 1905, Chap. 778, 33 Stat. at L. 811; Act of March 3, 1911, Chap. 231, Sec. 291, 36 Stat. at L. 1167, U. S. C. A. Title 40, Sec. 270), requiring the execution and delivery of a bond conditioned (1) upon the performance of the contract by the contractor, and (2) upon the contractor's promptly making payment to all persons supplying labor and materials for the job. Such bond (R. 91-92), which was made and executed by the National Surety Company acting through petitioner Martin, as aforesaid, is conditioned in accordance with the provisions of the contract and in accordance with the provisions of the statute, which is expressly mentioned in the bond (R. 92).

In conjunction with this matter Martin, as agent for the Surety Company, had the contractor execute a written application for such surety bond, wherein it was expressly warranted "**that the applicant (Tobin) has not assigned and would not assign his payment on this contract, or any part thereof,**" to anyone (other than the National Surety Company) (R. 89). Said application also contained the customary assignment by the contractor to the Surety Company of all future payments, as well as the retained percentage, by way of security for the obligations assumed by the Surety Company (R. 91); and it was agreed that the contractor would deposit sufficient additional funds with the surety to cover any contingent claim or claims arising from the contractor's failure to pay them (R. 91).

The work on the Carlinville post office continued from its inception in the early part of 1932 until the Government took possession of the building on February 1, 1933 (R. 78-79). The time specified in the contract for the completion of the work was January 18, 1933, and a penalty of $35.00 per day was provided for failure to complete the

building on time (R. 79). While there remained some work to be done at the time the Government took possession of the building on February 1, 1933 (R. 79), the trial court (R. 28) and the Court of Appeals (R. 156) found that the building was substantially completed at the time the Government accepted it and took possession on February 1, 1933.

The trial court further found that in December, 1932, when Tobin, the contractor, gave Martin the power of attorney to collect the funds remaining in the Government's hands, Tobin had defaulted in his obligations under the contract with the Government requiring him "to furnish all labor and materials" and in his obligations under the bond, required by statute in connection therewith and expressly requiring the prompt payment to persons who supplied labor and materials—in that Tobin had not paid at least $15,000.00 of accrued labor and material bills (R. 29, 28).

In the fall of 1932 the contractor was getting into financial difficulties and defaulted in making payment of the accruing labor and material bills (R. 84-85). Tobin testified:

> "In December, 1932, I was getting in difficulties and I had a conversation with Mr. Hauck of the National Surety Company at that time, in which he told me that he wanted to have joint control of the balance of the funds due from the Government" (R. 107).

As a matter of fact Tobin was then insolvent, and at the hearing on the merits in March of 1933 it was established that Tobin had about $5,700.00 due from the Government and only one other resource—"a claim against the Government that probably will be settled"—whereas he was heavily involved with another surety company that had a

contingent claim against him for $35,000.00 (R. 109), and the unpaid claims of laborers and materialmen on the Carlinville job totaled $24,557.09 (R. 50-53).

During most of the period that Tobin & Company was working on the Carlinville post office job it was also working on the Havana, Illinois, post office job on which appellant Guy S. Martin also furnished Tobin with bond through another surety company (R. 103). Martin claims to have advanced money from time to time for use on the two construction jobs in question (R. 94) and contends that his Exhibit O (R. 125-127) is an accurate statement of moneys advanced by him on the Carlinville post office job. The actual facts about the matter, however, are as follows: Mr. Martin's secretary and bookkeeper testified:

> "We do not have any system or records in our office which would allocate the amount of money paid out by Mr. Tobin on the Carlinville job and on the other job; it is all in one ledger" (R. 103).

Petitioner Martin testified with respect to the matter as follows:

> "I assume that money went to the Carlinville job. I do not have any way of knowing. It was advanced to Mr. Tobin for that purpose. I do not know where it went. When I gave checks for these various amounts payable to Mr. Tobin I do not know where the money went" (R. 97-98).

While Martin's codefendant, Tobin, did testify in October of 1934, at the claims hearing, that the moneys Martin advanced "went directly into the job," yet he testified nearly two years before at a hearing on February 20, 1933 (R. 78):

> "I think the $4,716.00 (referring to a bookkeeping entry) was a Government check, and the other funds

were money obtained either through Mr. Martin or transferred probably from the Tower Grove Bank (where Martin had his bank account). I disbursed that money to pay bills, some on Havana and some on Carlinville" (R. 107).

Tobin also testified:

"As to the money paid out to material and labor men on the Carlinville job, I myself did not pay any. At the beginning of that job I had a man who paid bills and labor" (R. 106).

The total contract price was $49,500.00 (R. 88) and at the time Tobin executed the power of attorney in favor of Martin, Tobin had already collected on the job approximately $33,000.00 (R. 107). Although about 90 per cent of the entire job was subcontracted by Tobin (R. 107), and none of the subcontractors defaulted (R. 109) there remains unpaid to subcontractors, laborers and materialmen the sum of $24,557.09 (R. 50-53).

On December 20, 1932, when the Surety Company demanded joint control of the balance of the funds due from the Government (R. 83, 107), the contractor, Tobin, advised the Surety Company that he wanted to see his attorney about executing the power of attorney given to him by the Surety Company for that purpose. However, instead of executing and returning the power of attorney, Tobin took it to Martin (R. 108). The next day, December 21, 1932, Martin procured a new power of attorney, executed by Tobin to Martin (R. 99, 101). Martin also prepared a letter to the Treasury Department, which Tobin likewise signed, directing that all of Tobin's checks be forwarded to petitioner, Guy S. Martin (Exhibit H, R. 117). On December 28, 1932, Martin forwarded the power of attorney and the letter written by Tobin to the Treasury Department (R. 117).

Between December 20, 1932, and February 6, 1933, when Martin actually collected the money from the Government, various officials of the National Surety Company had conferences with Martin concerning the difficulties that had arisen by virtue of the contractor's nonpayment of labor and material bills (R. 81-83). Martin at all times concealed the fact that he had said power of attorney and affirmatively misrepresented the fact that he claimed to have money due him on account of loans made to the contractor, Tobin (R. 82, 83). The contractor, Tobin, like Mr. Martin, also actively misrepresented and concealed from the Surety Company the true facts with respect to having executed a power of attorney in favor of Martin and with respect to the fact, if it be a fact, that Tobin owed Martin any money (R. 86, 87, 108). In January, 1933, during the period of time that Martin was fraudulently concealing the fact that he had procured and forwarded to Washington a power of attorney in his own favor and was fraudulently misrepresenting to the National Surety Company that Tobin owed him no money, the National Surety Company was prepared to institute a bill in equity to protect its equitable right as the contractor's surety to be exonerated of liability on this job, and Martin had knowledge of the Surety Company's intentions at that time (R. 99).

On February 4, 1933, Tobin and his then attorney, Mr. Oliver Erbs, of the firm of Carter & Jones, called on the National Surety Company's attorneys and stated that they desired to work out a joint control of all moneys due from the Government for the purpose of paying labor and material bills (R. 86-87). The Surety Company's attorney asked them if they had secured the power of attorney in favor of the Surety Company which they had delivered to appellant Martin and Mr. Erbs advised the Surety

Company's attorney that he would secure it the following Monday (February 6, 1933). Tobin assured the Surety Company's attorney that the power of attorney in question was still in Martin's possession and that he did not have any outstanding obligations to Martin (R. 86, 87). On the afternoon of the same day, Tobin sent Martin to Washington to "collect that money for me" (R. 108). At the first hearing in this matter, which was on the application for preliminary injunction, Tobin, who was called as a witness on behalf of Martin, explains the foregoing transaction as follows:

> "The reason I did not tell you I wanted Mr. Martin to get this money and that I was going to send him to Washington to get it, was that you did not ask me and I did not have it in mind at that time. I made up my mind to send Mr. Martin to Washington on Saturday afternoon" (this was the same afternoon) (R. 108).

Mr. Martin's own explanation of his actions in this matter are set forth in detail on pages 99 through 101 of the record. Martin testified, in part, as follows:

> "**When he (Tobin) gave me the power of attorney he said there were going to be some bills to pay and he wanted me to handle these funds** (R. 99). • • •
>
> I am not sure that I notified Mr. Hauck (adjuster for the Surety Company) that I had received it. I did not notify him that I had sent it into the Treasury Department; I was under no obligation to do so. I **was interested in seeing these accounts paid** • • • (R. 99). • • •
>
> The check I received I cashed in Washington, and I brought the money home in the form of a bank draft payable to me. My motive in cashing the Government check in Washington was to get the money.

> I got it in cash and bought a draft. The money now is in the Tower Grove Bank in my account. The draft was for $10,448.10 and I deposited it in the Tower Grove Bank. I figured I have paid this account (meaning his personal loan to Tobin) out of that draft. **My account does not show that I have paid it by a credit entry.**"

It was on Monday, February 6, 1933, that appellant Martin collected the money in Washington (R. 96), as a result of the hurried trip which he made in secrecy, even from Tobin's attorneys (R. 86, 87, 101, 108), who appeared in this case as Martin's attorneys about ten days later (R. 16).

This suit was instituted on February 9, 1933 (R. 5), the day after the Surety Company learned that appellant Martin had gone to Washington and collected the money (R. 87). On February 15, 1933, appellant Martin, together with his attorney, Mr. Bull, of the firm Carter & Jones, was in the office of Mr. Mayne, attorney for the National Surety Company, when Plaintiff's Exhibit E (R. 114-115) and Plaintiff's Exhibit F (R. 116) were dictated with their tacit approval (R. 114). Exhibit E was a draft of a proposed preliminary injunction in favor of the National Surety Company against Tobin and Martin in this case, and the Plaintiff's Exhibit F was a proposed agreement in the form of a letter addressed to appellant Martin's attorneys by the National Surety Company's attorneys, wherein, among other things, it was recited:

> "Pursuant to our understanding made in connection with the above styled case in which a temporary restraining order was issued by consent, it is our understanding that Mr. Tobin and Mr. Martin will arrange to effect a settlement with the labor and material creditors on the amounts such creditors claim to be due for the construction of the Carlinville, Illinois, Post Office Building • • •"

IV.

PROCEEDINGS IN THE COURTS BELOW.

The amended bill of complaint (R. 6-15) sets forth the identity of the parties; the contract with the Government for the erection of the Carlinville post office; the provisions of the Federal Statute under which the contract was let requiring the execution of a bond conditioned upon prompt payment to all persons supplying labor and material; the bond furnished conditioned upon the contractor's promptly making payment to all persons supplying labor and material in the prosecution of the work; the contractor's written application to the Surety Company in connection with the execution of the Surety Bond in question, wherein it was provided that the contractor Tobin assigned to the Surety Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable at the time of any breach or default in said contract (and wherein it was warranted that the contractor had not assigned and would not assign his payment on this contract, or any part thereof, to anyone other than the Surety Company) (R. 89); the failure of the contractor to pay the labor and material claims during the progress of the work, and the fact that the contractor permitted claims to be made against the Surety Company on the bond alleged to be in excess of $12,000; that the contractor's work had been substantially completed and that the Government had delivered vouchers (or estimates) to Tobin for $10,448.10 covering the final work (December, 1932, and January, 1933), except the agreed retained percentage of 10 per cent; that the contractor Tobin in addition to his outstanding labor and material bills in excess of $12,000 had other obligations and no assets of any

value with which to pay either the materialmen and laborers or anyone else; that the contractor Tobin had delivered to defendant Guy S. Martin (the Surety Company's former agent, who executed the bond in question and procured the application which Tobin signed in connection with the bond) a power of attorney in favor of the said Guy S. Martin for the collection of all vouchers and checks of the Government, for the purpose of depriving the plaintiff Surety Company of collecting the balance due under the contract and applying said amount to the payment of the unpaid bills of laborers and materialmen, and that Martin had collected the sum of $10,448.10, representing said December and January vouchers, or estimates, being the final two months of the work; that demand had been made upon Martin and Tobin to pay over the funds, but they each refused to do so, and that it would perpetrate a fraud upon the Surety Company and creditors of the contractor Tobin and would deprive them of payment for their labor and materials to permit Martin to retain the money which he had secured under the power of attorney, and would result in irreparable damage and injuries to plaintiff and creditors having claims for labor and material furnished under the contract in question (R. 10); that in view of the insolvency of the contractor, and the liability of the plaintiff Surety Company for the payment of the aforementioned claims for labor and materials, the Surety Company has in equity a lien upon the funds due from the Government under the facts of this case, including said final estimates collected by the said Guy S. Martin from the Government in connection with this particular job.

The prayer of the bill sought a permanent injunction against any additional collections from the Government by either Tobin or Martin; that Tobin and Martin be

perpetually enjoined from disposing of the moneys previously collected from the Government, particularly the $10,448.10, representing the final payment collected by Martin under the power of attorney; that Martin be ordered to deliver to the Clerk of the Court, or to a receiver, to be appointed by the Court, said sum of $10,448.10, representing the balance which Martin wrongfully received from the Treasurer of the United States, which amount was alleged to be then in his possession, and that when so deposited:

> "The said fund be impounded for the protection of plaintiff herein and all creditors who have outstanding unpaid claims for labor and material furnished in the construction of the Carlinville Post Office Building" (R. 14).

The bill also contained a prayer for "such other and further relief as the nature of the case may require and to the Court may seem meet and proper" (R. 15).

Defendants Tobin and Martin, being represented by the same counsel (who are appearing here as counsel for Martin), filed a joint and separate amended answer upon which the cause was tried (R. 18-25), which is sufficiently summarized in petitioner's brief herein.

Following the final hearing on the merits of the issues joined between plaintiff. National Surety Company and defendants Tobin and Martin, the trial court made and filed detailed written findings of fact and conclusions of law (R. 26-30). After Martin had paid the funds into the registry of the court in obedience to the decree, plaintiff petitioned the Court for an order fixing the time for the filing of claims (R. 32-33), and the order was duly made (R. 33), following which all of the respondents now before this Court (laborers and materialmen on the Carlinville

post office job) filed their respective claims to the funds in the registry of the court. Petitioner Martin likewise filed a claim (R. 34-38), in which he again asserted the same matters previously urged in his amended answer filed and heard the preceding year. A hearing on the claims was held October 18, 1934 (R. 130), following which the trial court again made and filed detailed findings of fact (R. 43-49).

At the time of the hearing on the claims counsel for plaintiff, National Surety Company (which had become insolvent and had been liquidated [R. 133]), in open court expressed a willingness to have respondents succeed to all of the Surety Company's rights in the impounded funds. Accordingly the situation at that time was that the contractor, Tobin, was insolvent; the surety on his bond, the National Surety Company, was insolvent and liquidated; the trial court had in its custody the impounded fund amounting to $10,448.10 and was confronted with the claims asserted thereto by the laborers and materialmen on the job from which the impounded funds arose and for whose benefit plaintiff expressly instituted the suit (R. 14), on the one hand, and on the other hand the contractor Tobin and the petitioner, Guy S. Martin, whose claim to the funds is based upon the facts hereinbefore set forth. The findings of the trial court with respect to petitioner Martin's claim to the impounded fund (R. 47-49) are accurately summarized in the opinion of the Court of Appeals (R. 157) and will not be repeated here.

V.

SUMMARY OF ARGUMENT.

A.

Laborers and materialmen whose labors and property go into a federal public work are entitled in equity to a priority in payment out of funds which have become due to the contractor who has become wholly insolvent, where such funds remain in the hands of the Government after the completion of the job.

1. The Government has a moral obligation to see that laborers and materialmen on its public works are paid for their services.

2. Where a contract is executed under a statute requiring a bond conditioned upon prompt payment of laborers and materialmen, the requirements of the bond are impliedly a part of the contract and it is an implied obligation of the contract that the contractor will promptly pay laborers and materialmen as their claims mature, and his failure to do so is a default under the contract.

3. A general creditor of an insolvent contractor on a federal public work who has completed the building, but has defaulted in payment of laborers and materialmen, cannot defeat the equitable rights of such laborers and materialmen in the funds then remaining in the Government's hands by thereafter obtaining a power of attorney and collecting the funds from the Government where such general creditor had actual knowledge of all of the facts.

B.

The surety on a contractor's bond executed in connection with a federal public work has an equitable lien

upon all funds which have become due and payable by the Government and remain in the Government's hands after the completion of the job or after a default by the contractor, where the contractor has become insolvent and has failed to pay accruing labor and material bills and where it is apparent from the contract, the statute and the agreement between the contractor and the surety in the application for the bond that the intention of the parties was to pay any obligation for which the surety might become liable under said bond out of the funds in question.

1. Where the principal has defaulted in his obligations for which the surety is liable, there arises without payment by the surety an equity of exoneration. The surety may proceed before payment quia timet, and equity will require to be applied to the obligation a fund which by the express or implied provisions of the contract of suretyship stands as a security for performance.

2. The statute making void all transfers of claims against the United States (31 U. S. C., Sec. 203) is solely for the protection of the United States against having to deal with a number of new parties in a transaction, and is not applicable to the assignment of funds accruing on a Government work executed by the contractor in favor of the surety on his bond as security for its obligations, where the requirements of the bond are specified by statute, the assignment operates in furtherance of the Government's moral obligation to see that those furnishing labor and materials on the job are paid, and no new parties are brought into the transaction by such assignment.

3. Even if the agreement between the contractor and his surety, contained in the application for the bond, be ineffective as an assignment in favor of the surety company, nevertheless, where all of the language of such application, considered together with

the main contract, the statute, and the bond, indicates an intention as between the parties that the funds accruing on the job will be used by the contractor to pay the claims of laborers and materialmen and thereby exonerate the surety of liability, a court of equity will impress a lien upon such funds in favor of the surety company, as between the parties and those having actual knowledge of the facts.

C.

The sole requisites of a partnership are that the parties must have joined together to carry on a trade or venture for their common benefit, each contributing either property, money or services and having a community of interest in the profits.

1. An established agreement to divide all net profits in specified proportions is presumptive evidence of a partnership and it is merely a question of fact whether, upon consideration of all of the other facts and circumstances, the presumption has been rebutted.

D.

An agent who has violated specific instructions of his principal and thereby placed his principal in a position where it is likely to suffer loss in a transaction, becomes liable to his principal as an indemnitor for any loss resulting from his wrongful act, and the agent cannot thereafter be heard to assert that he has acquired prior rights in funds arising in connection with such transaction, for which he remains an indemnitor of his principal even though the agency relationship has since terminated, but will be required to account to the principal for such money thereafter received by him in connection with such transaction.

E.

Where one who claims to have loaned money to a contractor obtains a power of attorney from the contractor under an express agreement to collect the money for the contractor and to first apply it to the payment of all unpaid labor and material bills on the job in connection with which the funds accrued, he will be required to account to the laborers and materialmen and the contractor's surety, who would otherwise be liable for the payment of such laborers and materialmen, as such funds will remain impressed with a trust in conformity with the agreement under which they were collected.

F.

The assignment of a chose in action made by an insolvent debtor with intent to defraud creditors, and with a reservation of right in favor of the debtor, is void, and the grantee acquires neither legal nor equitable rights thereunder.

G.

Where a general creditor of the contractor on a federal public work holds a void written assignment or power of attorney from the contractor, and by false statements and fraudulent concealment lulls the surety into a feeling of security, directly resulting in the surety delaying the taking of any action, such assignee upon thereafter collecting the funds from the Government, is estopped to assert that by so collecting such funds he has acquired any rights therein superior to the equitable rights of the surety and of the laborers and materialmen.

1. A power of attorney executed by a contractor on a federal public work in favor of a general creditor

covering funds to become due from the Government, is void. The subsequent collection of such funds by the holder of the power of attorney does not defeat equitable rights of the surety and of laborers and materialmen on the job with which such funds were impressed.

H.

A party must come into equity with clean hands.

VI.

ARGUMENT.

A.

In the petition for writ of certiorari filed herein, petitioner suggests that the issue decided by the Court of Appeals and the question presented in this court is whether laborers and materialmen on a federal public work are entitled to an equitable lien on "progress payments" which have been collected by the contractor and paid to one who has loaned him money. Respondents insist that the issue is not so broad. **The question presented in this case is whether laborers and materialmen, whose labors and property went into the particular job, are entitled in equity to a priority in payment out of funds which have become due to the contractor, who has become wholly insolvent,** WHERE SUCH FUNDS REMAIN IN THE HANDS OF THE GOVERNMENT AFTER THE COMPLETION OF THE JOB; and whether a creditor of the insolvent contractor can defeat such equitable rights of the laborers and materialmen by obtaining a power of attorney and collecting the funds from the Government, after the job has been completed and after the contractor has become insolvent, where such creditor **then** had full and complete knowledge of all of the facts.

The courts have never hesitated to recognize the fact that the United States has a moral obligation to see that laborers and materialmen on federal public works are paid for their services. [See **Belknap Hdw. & Mfg. Co. v. Ohio River Contract Co. (C. C. A. 6), 271 F. 144,** reaffirmed on later app.; **Mesker et al. v. Ohio R. Sand Co. et al., 285 F. 379** (appeal dismissed, **264 U. S. 572, 68 L. Ed. 856**); **Henningsen v. U. S. F. & G. Co., 208 U. S. 404.**] The stat-

ute in force at the time in question, **U. S. C. A., Title 40, Sec. 270,** contains an express recognition of this obligation by providing that all contractors on federal public works shall furnish a bond conditioned upon the prompt payment of all labor and material bills. The statute requiring the bond is impliedly a part of the contract **[Glades County v. Detroit Fidelity & Surety Co. (C. C. A. 5), 57 Fed. (2) 449]**; and it is therefore an implied condition of the contract that the contractor will promptly pay the laborers and materialmen as their claims become payable and his failure to do so is a default under such contract. [See **Henningsen v. U. S. F. & G. Co., 143 F. 810,** affirmed **208 U. S. 404, 52 L. Ed. 547; Heyward v. Goldsmith (C. C. A. 3), 269 F. 946; Cox v. N. E. Equitable Insurance Co. (C. C. A. 8), 247 F. 955; First National Bank v. Fidelity & Deposit Co. (C. C. A. 10), 65 Fed. (2d) 959,** l. c. 962.]

We respectfully urge that no basis exists in logic or reason to conclude that by including laborers and materialmen within the benefits of the bond the Government has fully discharged its moral obligation to see that the laborers and materialmen are paid. The statutory recognition of the Government's moral obligation merely emphasizes its existence. It does not extinguish it.

In the case of **Henningsen et al. v. U. S. F. & G. Co. (C. C. A. 9), 143 Fed. 810** (affirmed on appeal to this Court, **208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547**), an action was instituted upon facts and under circumstances essentially like the present action. In that case Henningsen and his partner contracted with the Government to construct certain buildings and the U. S. F. & G. Company executed the bond as surety, conditioned as in the instant case. After the buildings had been to a large extent completed, the contractor assigned the balance of the money coming to him under the contract for the purpose of

securing repayment of loans made to him by a bank during the progress of the work. The contract, in so far as concerned the completion of the buildings, was fully performed, but the contractors failed and refused to pay just and lawful claims of laborers and materialman amounting to about $15,000.00. Thereupon the surety company instituted a suit in equity for the purpose of establishing that both the surety and the unpaid laborers and materialmen on the job had an equitable lien on the funds remaining in the Government's hands (which do not appear to have been limited to the retained percentage), and to establish that the equitable rights of such unpaid laborers and materialmen were superior to any rights acquired by the money lender under an assignment. It is to be noted that the surety had not actually paid anything in that case, either at the time of the institution of the suit or at the time of the decree (143 F., l. c. 811), although it confessed its liability under its bond for unpaid labor and material claims, just as in the instant case the surety admitted its liability under its bond for the claims of unpaid laborers and materialmen (R. 9).

It appears from the briefs in the Henningsen case that the appellant pointed out that there had been no default by the contractor in the performance of his obligations to the Government inasmuch as the building had been completed; that the Government therefore had no further rights to be satisfied out of the funds remaining in its hands; and that no equitable lien existed in favor of the laborers and materialmen. The briefs filed by the surety company reflect that it based its position upon a right to be subrogated in equity to the prior rights of the laborers and materialmen who were creditors of the contractor.

In ruling the matter in favor of the surety company and against the assignee this Court stated:

"Is its equity superior to that of one who simply loaned money to the contractor, to be by him used as he saw fit, either in the performance of his building contract or in any other way? We think it is. It paid the laborers and materialmen, and thus released the contractor from his obligations to them, **and to the same extent released the Government from all equitable obligations to see that the laborers and supplymen were paid.** It did this not as a volunteer, but by reason of contract obligations entered into before the commencement of the work. • • •

"It is sufficient to say that we agree with the views of the Circuit Court of Appeals, expressed in its opinion in the present case:

> " 'Whatever equity, if any, the bank had to the fund in question, arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles, entitled to assert the equitable doctrine of subrogation, but it is equally clear that the bank was not, for it was a mere volunteer, and under no legal obligation to loan its money.' "

Judge Denison of the Sixth Circuit, in the case of **Belknap Hdw. & Mfg. Co. et al. v. Ohio River Contract Co. et al., 271 Fed. 144,** after reaffirming the Government's moral obligation to see that the claims of laborers and materialmen are paid, makes the following careful analysis of the basis of this Court's decision in the Henningsen case, supra, to wit:

"The surety's claim of priority in the fund was sustained, and this was done on the stated theory of subrogation. Since there cannot be the transfer of a right by subrogation, unless there is a right to be transferred, we think the necessary effect of the decision is to hold that the laborers and materialmen, in spite of or in addition to the giving of the bond, had

an original and continuing equitable priority in the fund, and that it was this right to which the surety was subrogated. This is not stated in the opinion in very express terms, but it had been pressed upon the Court (208 U. S. 407, 408, 28 Sup. Ct. 389, 52 L. Ed. 547) that there could be no such subrogation without such a right, and that there was no such right. On page 410 of 208 U. S., on page 391 of 28 Sup. Ct. (52 L. Ed. 547) the Court refers to and assumes that the Government, after the bond was given, was still charged with 'equitable obligations to see that the laborers and supply men were paid.' We are constrained to think that the decision necessarily rests upon the existence of this right, as one entitling these claimants to priority in payment out of the fund, and therefore as entitling the surety, as their equitable assignee by subrogation, to the same priority." • • •

"When Henningsen's surety paid up, the United States, the secured creditor, had been satisfied, and had no further claim on the fund, unless it bore the duty to devote the fund to the labor and material claimants; hence the latter proposition must be considered as affirmed."

The Court held that the laborers and materialmen on the job were entitled to an equitable lien on all of the funds which accrued on the job and were collected by a receiver appointed by the Court following the insolvency of the contractor and the insolvency of the surety, such funds totaling nearly $100,000.00 and being far in excess of the retained percentage.

The case of **Farmers Bank v. Hayes et al. (C. C. A. 6), 58 Fed. (2d) 34** (certiorari denied, **287 U. S. 602**), recognizes the existence of an equitable lien in favor of laborers and materialmen on a federal public work and expressly holds that the equitable rights of the laborers and materialmen extend not only to the reserved percentage un-

der the contract, but also to all other sums that have accrued under the contract. The opinion of Judge Simons states:

> "Upon the merits, the right of the surety to the fund here in dispute is settled by a long line of Federal and State cases * * * this is on the principle that a surety who gives bond to the owner to insure performance of a building contract by the contractor is subrogated to the rights of the owner in the percentage which the owner retains as security for the performance of the contract when upon default by the contractor the surety performs, as in the Prairie State National Bank case, or on the principle that when the contractor performs his obligation to the owner, but fails to pay labor and materialmen, and the surety is obligated to do so under his bond, the surety is subrogated to the liens of laborers and materialmen upon the fund reserved by the owner, as in the Henningsen case. * * * In either case the equitable rights of the surety become fixed as of the date of the bond and are superior to those of any holder of an after-acquired lien. Whether the lien of the surety extends only to the reserve percentage under the contract, or also to sums earned under the contract, and retained by the owner, is a question which has frequently been raised. We think it is now settled that it extends to both. Lacy v. Maryland Casualty Co., 32 F. (2d) 48; Exchange State Bank v. Federal Surety Co., 28 F. (2d) 485 (C. C. A. 8)."

In the Lacy case just mentioned Judge Parker, of the Circuit Court of Appeals for the Fourth Circuit, has carefully and accurately analyzed the authorities pertaining to the identical question now under consideration. The logic of his reasoning and the accurateness with which he has set forth the basis of the holdings of prior authorities leaves little to be added upon the subject. It would un-

necessarily lengthen this brief to undertake to quote that portion of the opinion which deals with this subject and which led him to the following conclusion:

> "The question arises whether this superior equity of the surety extends to the current estimates payable under the contract or merely to the retained percentage. We think that it extends to both" (32 F. [2d], l. c. 51).

In the case of **Exchange State Bank v. Federal Surety Co. (C. C. A. 8), 28 Fed. (2d) 485**, the Surety Company was forced to complete the job and pay labor and material claims. Thereafter there remained due under the contract about $31,000.00. The bank had loaned the contractor about $36,000.00 which was used largely in payment for labor and materials on the job and the bank took an assignment as security. Thereafter, suit was filed by the Surety Company against the bank over the right to the funds and in holding that an equitable lien in favor of the Surety Company "arose at the time of the execution of the bond and was superior to the assignment to the appellant bank," the Court did not limit such equitable lien to the retained percentages.

In the case of **U. S. Fid. & Guar. Co. v. Sweeney et al. (C. C. A. 8), 80 Fed. (2d) 235**, the Court expressly held:

> "Laborers and materialmen, however, have an equitable right to payment from funds due a contractor on a public improvement in preference to general creditors. Belknap Hardware & Mfg. Co. v. Ohio River Contract Co. (C. C. A. 6), 271 F. 144. The statutory requirement of a bond to protect them is not inconsistent with such equitable rights. American Surety Co. v. Westinghouse Elec. Mfg. Co. (C. C. A. 5), 75 F. (2d) 377. There is a recognized equitable right

of unpaid furnishers of labor or materials to such part of the contract price as may remain in the possession of the Government after the completion of the work by the contractor. Riverview State Bank v. Wentz (C. C. A. 8), 34 F. (2d) 419; Henningsen v. United States Fidelity & Guar. Co., 208 U. S. 404, 28 S. Ct. 389, 52 L. Ed. 547; Farmers Bank v. Hayes (C. C. A. 6), 58 F. (2d) 34; American Surety Co. v. Westinghouse Elec. Mfg. Co. (C. C. A. 5), 75 F. (2d) 377."

In the case of **In re P. M'Garry & Son (C. C. A. 7), 240 Fed. 400**, the contractor, M'Garry, had agreed to furnish all labor and materials for making certain improvements in the Post Hospital (a Government building) at Des Moines, Iowa, for the total contract price of $2,559.00. A bond was executed by the American Bonding Company, as required by the statute, conditioned as in the instant case. Thereafter the work was completed and accepted by the Government, whereupon there remained due and payable to the contractor the sum of $2,000.00, which was practically the entire contract price. The contractor had become bankrupt and the surety paid a portion of the claims of laborers and materialmen. Others had not been paid and the holder of an assignment from the Government collected from the Government the $2,000.00 that had accrued on the contract, just as was done in the instant case. The question arose in the bankruptcy court as to the respective rights of the unpaid laborers and materialmen, the surety company, the assignee of the contractor, and the contractor's general creditors with respect to the funds that had accrued on the job. In holding that the funds were subject to equitable rights in favor of the laborers and materialmen and in favor of the surety company, the Circuit Court of Appeals stated:

"The $2,000.00 fund in the hands of the trustee in bankruptcy stands charged with the same equities as to the materialmen and the surety upon the bond who had paid the materialmen, as it was bound to do, as when it was undistributed in the hands of the United States. Whatever rights were acquired by reason of the contractor's assignment and payment thereon by the United States, were subject to the right of the materialmen and surety on the bond to have their claims paid in full. • • •

"In the case at bar, the assignee of the contractor stands in the position of a mere volunteer and is not, therefore, entitled to the benefit of the doctrine of subrogation. Under the authorities quoted, the materialmen and the surety in the case at bar have a prior right to the extent of their claims in the fund so in the hands of the trustee, in the nature of an equitable lien. It precedes the rights of assignees of the contractor and also those of the general creditors."

A superior equitable lien or right in favor of laborers or materialmen in all funds remaining due from the Government either after the completion of the work or after a default by the contractor, was the basis of decision in each of the following cases:

First National Bank of Seattle v. City Trust, Safe Deposit & Surety Co. (C. C. A. 9), 114 Fed. 529;
Philadelphia National Bank v. McKinlay (U. S. Ct. of Appeals for District of Columbia), 72 Fed. (2d) 89;
Moran v. Guardian Cas. Co., 76 Fed. (2d) 438;
London & Lancashire Indemnity Co. v. Endres et al. (C. C. A. 8), 290 Fed. 98;
Riverview State Bank v. Wentz et al. (C. C. A. 8), 34 Fed. (2d) 419; and
Maryland Casualty Co. v. Dulaney Lbr. Co. et al. (C. C. A. 5), 23 Fed. (2d) 378.

The foregoing discussion has considered the question presented solely from the standpoint of the existence of an equitable lien in favor of laborers and materialmen upon funds remaining in the Government's hands after completion of the job. We now turn to the question of the equitable rights acquired by the Surety Company in those funds arising in connection with its suretyship obligations at the inception of the contract.

B.

The Surety on a Contractor's Bond Executed in Connnection With a Federal Public Work Has an Equitable Lien Upon All Funds Which Have Become Due and Payable by the Government and Remain in the Government's Hands After the Completion of the Job or After a Default by the Contractor, Where the Contractor Has Become Insolvent and Has Failed to Pay Accruing Labor and Material Bills and Where It Is Apparent from the Contract, the Statute, and the Agreement Between the Contractor and the Surety in the Application for the Bond, That the Intention of the Parties Was to Pay Any Obligation for Which the Surety Might Become Liable Under Said Bond Out of the Funds in Question.

In the Surety Company's amended bill, upon which this case was tried (R. 6-15), it is expressly stated that the suit was instituted for the benefit of "all creditors who have outstanding unpaid claims for labor and material furnished in the construction of the Carlinville Post Office Building" (R. 14). However, in addition to that plaintiff pleaded the insolvency of the contractor, his default in the payment of accrued labor and material bills, and after admitting its own liability under the bond for such bills,

plaintiff pleaded its right in equity to be exonerated out of the funds which had accrued on the job and remained in the Government's hands after the completion of the work on February 1st (R. 79). Plaintiff also pleaded that when the funds were thereafter collected on February 6th by the assignee, Martin (R. 96), such funds remained impressed with the equities that had then accrued in favor of the Surety Company, with respect to which Martin had actual, as well as constructive, notice. (Plaintiff also alleged that the power of attorney in favor of Martin was a fraudulent conveyance, a matter that will be hereafter treated separately.) In this connection it is to be recalled that the contract with the Government, in addition to requiring the statutory bond guaranteeing the prompt payment of all claims for labor and materials, contained this provision:

> "(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, **after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract**, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein" (R. 88).

The bond, which is required by statute as a part of the contractor's obligation to the Government and which is executed by the contractor as principal, expressly binds and obligates the contractor to "**promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract**" (R. 92); and in conjunction with said bond,

which was executed by petitioner Martin as agent for the National Surety Company, the contractor was required to sign an application to the Surety Company which bound and obligated the contractor to indemnify and keep indemnified the Surety Company and to hold it harmless against all liability, loss and expenses which the Surety Company shall at any time sustain or incur under the bond (R. 89). The contractor further agreed in the application as follows:

> "Sixth. That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the Company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said bond" (R. 91).

The application contained this further highly important provision:

> "that the applicant had not assigned and **would not assign** his payment on this contract or any part thereof" (R. 89).

Having in mind the foregoing facts in connection with the execution of the bond by the Surety Company, respondents respectfully urge the proposition that when a contractor on a public work not only defaults in payment

of accrued labor and material bills, but has also become insolvent, his surety then becomes entitled in equity to have all of the unpaid funds which remain in the hands of the Government at that time applied in exoneration of its liability under the bond. We know of no clearer statement of the proposition than the following excerpt from the case of **Glades County v. Detroit Fidelity & Surety Co. (C. C. A. 5), 57 Fed. (2d) 449**, to wit:

> "As between the surety and the principal there arises without payment by the surety and without his having even been sued an equity of exoneration. Story, Eq. Juris. (14 Ed.), Sec. 1011; Pomeroy, Eq. Rem., Sec. 919; Stearns on Suretyship, Sec. 281; Pavarini v. Title Guaranty Co., 36 App. D. C. 348; Ann. Cas. 1912 C 367 and note. To have subrogation a surety must have discharged in full the obligation for which he is bound, and he then seeks to recover for himself the subject of the suit. In case of exoneration he proceeds before payment quia timet, and seeks to have payment made to the creditor. If the principal is solvent, the decree need not go further than to require the principal to pay, but, when he is fraudulent, insolvent, or has absconded, the equity of exoneration needs and may have further protection. Injunctions, receivers, and equitable garnishments have been granted, property recovered from third parties, and funds traced and applied. West v. Chasten, 12 Fla. 315; Hayden v. Thrasher, 18 Fla. 795; Bunting v. Ricks, 2 Dev. & B. Eq. (22 N. C. 130, 32 Am. Dec. 699); Sanford v. U. S. F. & G. Co., 116 Ga. 689, 43 S. E. 61; Cooper v. National Fert. Co., 132 Ga. 529, 64 S. E. 650. Assuredly equity will require to be applied to the obligation a fund which by the very contract of suretyship stands as a security for performance. In Story Eq. Jur., Sec. 1011, after stating the jurisdiction to protect the surety quia timet, there is added: 'And generally it may be

stated that in case of contracts, express or implied, courts of equity will interpose to preserve the funds devoted to particular objects under such contracts and will decree what is in effect specific performance, security to be given, or the fund will be placed under control of the court.' "

While in that case the fund that happened to remain in the hands of the Government was the retained percentage, there is no basis in reason for so limiting the application of the rule, in view of the provisions which we have quoted above from the contract, the bond and the application for the bond, which are involved in the instant case. One cannot read those voluntarily assumed contractual obligations undertaken by the contractor Tobin and by the petitioner Martin, who was then acting for the Surety Company, without coming to the conclusion that as between the parties an obligation arose, enforceable in a court of equity, to apply all funds accruing on this job to the exoneration of the surety's liability. If the surety had such equitable right from the inception of the contract, the right became certain and fixed when upon the completion of the job the contractor had become insolvent and had defaulted in payment of labor and material bills, and the funds in question then remained in the Government's hands. Petitioner Martin, with knowledge of all of these facts and with knowledge of the contractor's insolvency, could not defeat the rights that had been acquired by the Surety Company by thereafter collecting the funds. See:

Cox v. New England Equitable Ins. Co. (C. C. A. 8), 247 Fed. 955;
U. S. F. & G. Co. v. Bank of Brenton, 4 F. S. 272;
In re P. M'Garry & Son, 240 Fed. 400;
U. S. F. & G. Co. v. Sweeney et al., 80 Fed. (2d) 235;

First National Bank v. City Trust Safe Deposit & Surety Co., 114 Fed. 529;
Moran v. Guardian Cas. Co., 76 Fed. (2d) 438.

The Circuit Court of Appeals in the instant case held that that clause in the application for the bond by which the contractor Tobin assigned to the Surety Company not merely the reserved percentages, but all funds becoming due and payable on the contract, by way of security for the Surety Company's obligations, was void under the provisions of 31 U. S. C., Sec. 203 and cases construing said statute, such as **Spofford v. Kirk, 97 U. S. 484.** Respondents feel that inasmuch as the surety's obligations were required by the provisions of the statute (40 U. S. C., Sec. 270) and no new parties are brought into the situation as a result of the assignment made by the contractor to the surety, the Circuit Court of Appeals gave too narrow a construction to the statute prohibiting assignments and lost sight of the objects sought to be accomplished by its enactment. We respectfully urge that this Court should permit the assignment contained in the application for the bond to be fully sustained under the authority of the following cases:

Goodman v. Niblack (12 Otto), 102 U. S. 556, 26 L. Ed. 229;
Price v. Forrest, 173 U. S. 410, 43 L. Ed. 749;
McGowan v. Parrish, 237 U. S. 285, 59 L. Ed. 955;
Lay v. Lay, 248 U. S. 24;
Wardman v. Leopold, 85 Fed. (2d) 277, l. c. 281.

The Government's moral obligation to see that laborers and materialmen are paid on a public work is an additional reason for relaxing the strict letter of the statute prohibiting assignments, as was done in the Goodman case, supra (involving a voluntary assignment for the benefit of

creditors), and justifies the application of the rule of law that where the reason for the statute has failed the statute itself has no application.

But irrespective of the effectiveness of the assignment in favor of the Surety Company to operate as an "assignment," respondents respectfully urge that this Court is nevertheless entitled to consider all of the language contained in the application for the bond, including that relating to the assignment of payments accruing on the job, **for the purpose of determining whether the parties have (as between themselves and those having actual knowledge of the facts, as Martin did) indicated an intention to pay any obligation for which the surety may become liable under the bond out of the funds in question**, to an extent sufficient to impress those funds with an equitable lien in favor of the surety as between the parties and those having actual knowledge.

We quote the following pertinent language from Judge Booth's opinion in the case of **Exchange State Bank v. Federal Surety Co. (C. C. A. 8), 28 Fed. (2d) 485**, to wit:

> "We think the first contention of appellant rests upon a misconception of the nature of an equitable lien, as well as of the real status of the assignment agreement contained in the application for the bond. An equitable lien may arise ex aequo et bono, or it may arise out of an express contract. 37 C. J. 315, 319; Pomeroy, Eq. Juris. (3d Ed.), Sections 1239, 1235; Bishpam on Equity, Par. 351; Walker v. Brown, 165 U. S. 654, 17 S. Ct. 453, 41 L. Ed. 865. And we see nothing in the nature of an equitable lien which would prevent it from having its origin in both sources. In such cases the express contract would serve to make definite and certain some elements which otherwise would have to be ascertained from surrounding facts and circumstances.

"Such, we think, is the proper construction to be placed upon the assignment agreement in the bond application in the case at bar. That the equitable lien may be enforced, though an assignment agreement exists, has been held in numerous cases. American Surety Co. v. Finletter (C. C. A.), 274 F. 152; U. S. F. & G. Co. v. City of Bristow (D. C.), 4 F. (2d) 810; Ottumwa Boiler Works v. O'Meara (Iowa), 218 N. W. 920; City of Detroit v. Fidelity & Deposit Co., 240 Mich. 213, 215 N. W. 394. We have not been cited to any case holding the contrary. It may, indeed, be doubted whether such assignment agreements in surety bond applications can be given any force, except the limited one above indicated. See Jenkins v. National Surety Co., 277 U. S. 258, 48 S. Ct. 445, 72 L. Ed. 874, opinion filed May 14, 1928. We think that the trial court, in the case at bar, properly held that the Surety Company had an equitable lien.

"That the equitable lien thus recognized arose at the time of the execution of the bond and was superior to the assignment to the appellant bank is decided by the great weight of authority."

The case of **Geddes v. Reeves Coal & Dock Co., 20 Fed. (2d) 48**, asserts the proposition that a contract under which one party is to receive compensation for services out of a particular fund, if and when realized, and which has been performed by such party, gives him an equitable lien on the fund when created in the hands of any one having notice of the contract; and in so holding the Court states:

"But, upon consideration, like the Circuit Court of Appeals of the Third Circuit in American Surety Co. v. Finletter, 274 F. 152, 156, and Judge Kennamer, in U. S. Fidelity & Guaranty Co. v. City of Bristow (D. C.), 4 F. (2d) 810, 'we are inclined rather to the views of the same court (the Supreme Court) ex-

pressed in **Ingersoll v. Coram**, 211 U. S. 335, 29 S. Ct. 92, 53 L. Ed. 208, accepting the rule stated in **Walker v. Brown**, 165 U. S. 654, 17 S. Ct. 453, 41 L. Ed. 865, to the effect that **an express executory contract in writing, whereby the contracting parties sufficiently indicate an intention to make some particular property or fund, therein described or identified, a security for a debt or other obligation, creates an equitable lien on the property so indicated.'** "

In the case of **Sexton v. Kessler & Co., 225 U. S. 90**, Mr. Justice Holmes, speaking for this Court, said:

"While the phrase 'equitable lien' may not carry the reasoning further or do much more than express the opinion of the Court that the facts give a priority to the party said to have it, we are of opinion that the agreement created such a lien, at least; or, in other words, that **there is no rule of local or general law that takes from the transaction the effect it was intended to produce. Hurley v. A. T. & S. F. Ry. Co., 213 U. S. 125,** * * *."

Accord:

Ingersoll v. Coram, 211 U. S. 335, l. c. 367-8.

In addition to the clause in the contractor's application for the bond, whereby the future payments were assigned to the Surety Company as security for its obligations, **said application contained an express agreement on the part of the contractor that he would not thereafter transfer any part of those funds to any one** (R. 89). In the case of **Central State Bank v. U. S. F. & G. Co. (C. C. A. 5), 9 Fed. (2d) 326,** Certiorari denied **270 U. S. 656**, where an entirely analogous clause was under consideration, the Court stated:

"The bank took its assignment with full notice of

the clause of the contract which provided that no assignment should be binding without the written consent, not only of the school board, but of the surety, also. That clause, in and of itself, is, in our opinion, sufficient to establish the superiority of the surety's claim over that of the bank. Prairie State Bank v. United States, 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412; Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404, 28 S. Ct. 389, 52 L. Ed. 547. It provides against assignment without the surety's consent, not only of the contract itself, but of any interest therein, which, of course, included the reserve fund which is the subject of this controversy."

The cases of **U. S. F. & G. Co. v. City of Bristow et al. (D. C.), 4 Fed. (2d) 810**, and **Hartford Accident & Indemnity Co. v. Coggin, 78 Fed. (2d) 471, l. c. 477-8**, expressly recognized that language in an application for a bond virtually identical with the provisions contained in the application for the bond in the instant case, give rise to an equitable lien in favor of the Surety Company. While in several of the cases to which we have referred it happened that the retained percentage was all that was involved, yet the controlling principles of law which led the courts to hold that an equitable lien existed, are not thus limited, and are applicable here, in view of the broad language contained in the application for the bond involved in the instant case, clearly indicating the parties' intentions.

We desire to particularly direct the Court's attention to the case of **Philadelphia National Bank et al. v. McKinley et al., 72 Fed. (2d) 89**, certiorari denied **293 U. S. 583**. In that case the contractor on a federal public work partially completed the job, incurring various labor and material bills, and defaulted. Thereupon the Surety Company completed the job, incurring additional labor and material

bills. About the time it completed the job the surety became insolvent and there remained in the Government's hands $68,244.86. Various laborers and materialmen, some of whom furnished labor and materials to the original contractor, and some of whom furnished labor and materials to the Surety Company, filed suit against the Government, the contractor's trustee in bankruptcy and the Surety Company to establish their equitable lien upon all of the funds so remaining in the Government's hands. In sustaining their claim of lien the Court stated:

> "In the view we take of this case, that sum is earmarked with the claims of all persons furnishing supplies and labor on the contract, and this is true because, irrespective of the statutory bond, those persons who furnish labor and do work on a Government project have an equitable lien on the fund, for the payment of their work and labor, until the fund is paid to the contractor. Belknap Mfg. Co. v. Ohio R. Co. (C. C. A.), 271 Fed. 144." • • •
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> "The obligation of the surety was to pay these debts. If this obligation had been discharged, the fund now in the hands of the government would belong to it, but since it was not complied with, **and since the surety is, by reason of insolvency, unable to comply, it is a fair conclusion, we think, that irrespective of the question whether the laborers and supply men had equitable liens on the fund, at least, in the circumstances we have named, they should be considered by a court of equity as subrogated to all the rights of the surety,** who admittedly had such a lien."

Respondents urge that an entirely analogous situation is presented here, in view of the contractor's insolvency and of the Surety Company's insolvency. The rules announced in the case last cited are those which a court of equity should apply to the situation presented here.

The equitable rights of a surety company, in a case involving merely the retained percentage, was recognized by this Court in **Prairie State National Bank v. U. S., 164 U. S. 227.** That the controlling principles forming the basis for this Court's decision in that case are equally applicable to all funds remaining in the Government's hands after the completion of the job, and the insolvency of the contractor, is distinctly recognized and pointed out in the cases of **First National Bank v. City Trust, Safe Deposit Co. (C. C. A. 9), 114 Fed. 529,** and **Lacy v. Maryland Casualty Co. (C. C. A. 4), 32 Fed. (2d) 48** In the latter case Judge Parker stated:

> "The leading case on the rights of the surety is Prairie State Bank v. U. S., supra, in which the opinion was written by Mr. Justice White. Although that case dealt with rights in a retained percentage, the principles upon which the decision was based support as well the right of the surety to unpaid current estimates. The Court there said:
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> "'Hitchcock's right of subrogation, when it became capable of enforcement, was a right to resort to the securities and remedies which the creditor (the United States) was capable of asserting against its debtor Sundberg & Company, had the security not satisfied the obligation of the contractors, and one of such remedies was the right based upon the original contract to appropriate the ten per cent retained in its hands. If the United States had been compelled to complete the work, its right to forfeit the ten per cent and apply the accumulations in reduction of the damage sustained remained. The right of Hitchcock to subrogation, therefore, would clearly entitle him when, as surety, he fulfilled the obligation of Sundberg & Company, to the Government, to be substituted to the rights which the United States might have asserted against the fund."

In the First National Bank case, supra, Judge Gilbert stated:

> "By abandoning the contract the contractors lost the right to compel the city to pay them any sum whatever on account of the work which they had done. Their assignee, the bank, stood in no better position than they. The city undoubtedly had the right to declare the contract and all unpaid sums which it had promised to pay thereunder forfeited. **That it had this right is not disputed, but it is said that the city has not exercised it, and that, therefore, the right cannot avail the surety. But the true inquiry is, not what has the city done, but what had it the right to do?** It had the right, if it had itself assumed the completion of the abandoned work, to retain for its own protection not only the stipulated 30 per cent, but all sums then due or earned under the contract, and no assignment by the contractors could defeat that right."

Accord: Moran v. Guardian Cas. Co., 76 Fed. (2d) 438, wherein it is also pointed out that the fact that the moneys borrowed by the contractor from the holder of the assignment were used in the payment of labor and material bills did not give the assignee any additional rights nor in any way defeat the Surety Company's prior equitable rights.

In Conclusion, it should be remembered that in the instant case the Surety Company had already tried out the issues as between itself and the assignee, Martin (R. 118, 26, 30), and the funds in question had been paid into the registry of the District Court (R. 31, 32) prior to the time that the Surety Company became insolvent and was liquidated (R. 133). It was nearly a year later that the Court made an order directing claimants to the funds to file their

claims (R. 33-34) and at the final hearing on the claims counsel for the Surety Company confessed and admitted the right of the laborers and materialmen to succeed to all of the Surety Company's rights in this case (R. 133-4). This was in conformity with the allegations of the amended bill praying that the funds be brought into the registry of the court for the benefit of the laborers and materialmen on the job (R. 14). Respondents, therefore, urge that they are in a position to claim the benefits of all rights and equities of the Surety Company, as well as all rights and equities to which they themselves are entitled, in the funds in question. Any result other than the one reached by the District Court and the Circuit Court of Appeals in the situation presented here would give rise to a situation by which contractors of uncertain financial standing and integrity could procure financing through money lenders on a "division of profits" basis, and leave the United States Government in the position of having established a policy of acquiring title to public buildings and improvements without assuming any obligation, legal or moral, of paying those whose labor and materials went to create the building or improvement in question, whether the furnishers of such labor and materials be the materialmen, as in this case, or the Surety Company, after a default by the contractor. Money lenders are mere volunteers that the Government has no moral duty to protect. In addition, as a matter of public policy, it would be better to establish rules of law which would result in solvent contractors bidding on Government projects and discourage those who would have to make arrangements for finances by borrowing the money for the project. Upon considerations of precedent and authority, upon considerations of reason and of logic, and upon considerations of the questions of policy involved, respondents earnestly urge that

the rulings of the courts below in the instant case should be in all respects affirmed. In the event this Court agrees with our views concerning the matters that have been discussed, it will not be necessary to consider the additional points hereinafter set forth, as the Court of Appeals did not pass upon these points. However, if this Court, for some reason not now apparent to respondents, should adopt a view contrary to that adopted by the trial court and the Circuit Court of Appeals with respect to the foregoing points, we assume that it will nevertheless consider the additional points hereinafter set forth, each of which points out a conclusive reason why the petitioner, Martin, is not entitled to the funds in question, but respondents are.

C.

The Sole Requisites of a Partnership Are That the Parties Must Have Joined Together to Carry on a Trade or Venture for Their Common Benefit, Each Contributing Either Property, Money or Services and Having a Community of Interest in the Profits.

From a consideration of all of the facts in the record and from the Court's personal observation of the witnesses the District Court found as a fact that petitioner Martin "was a partner of A. Clement Tobin in connection with the Carlinville post office," and could not therefore assert claims superior to the claims of the laborers and materialmen who became creditors of that venture (R. 47). As stated in petitioner's brief herein, the Court of Appeals did not find it necessary to rule upon any point except that which we have already discussed. However, petitioner is mistaken in stating that the only evidence of partnership is the testimony of the contractor relative to his agreement with Martin to divide profits on the job and in concluding

that the relationship was therefore merely that of borrower and lender within the rule of **Meehan v. Valentine, 145 U. S. 611,** as will be presently pointed out.

The case of **Meehan v. Valentine, 145 U. S. 611,** appears to us to have been correctly decided and to correctly announce as many general rules as a court could safely announce concerning so uncertain a subject as the law of partnerships. In that case the Court was construing a written agreement, nothing more. That agreement expressly stated that the sole arrangement existing between the parties was the loan, and further negatived the idea of any **existing** partnership by use of the following language in a renewal of said obligation:

> "**We have two propositions for partnerships May 1st,** and if we accept either we will then, if you desire, return your loan."

The Court held that the mere fact that the agreement provided that the defendant should be paid one-tenth of the net profits over the sum of $10,000.00 per annum, in addition to interest on the money loaned, as the expressed consideration **for the loan,** did not make the lender liable for all of the firm's obligations as a partner. At the outset of the opinion Mr. Justice Gray expressly approves **Ward v. Thompson, 63 U. S. 330,** and states:

> "The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits."

After tracing many authorities reflecting the development of the law of partnerships, this Court, in the Meehan case, concluded:

"In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that **those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions.** If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. **And participating in profits is presumptive, but not conclusive, evidence of partnership.**"

Mr. Pollock's definition is most suggestive **(Pollack, Partnership, 11th Edition, page 4)**:

"Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them."

In the case of **Ward v. Thompson, 63 U. S. 330**, it was held that where the parties have joined together to carry on a certain venture (the operation of a steamboat between designated points) for their mutual profit, one contributing the vessel, the other his labor and services, and there

is a community of profits on a fixed ratio, it is a partnership. Accord:

Beauregard v. Case etc., 91 U. S. 134;
Campbell v. Northwest Eckington Improvement Co. et al., 229 U. S. 561.

In the latter case it is held that an agreement between the owners of unimproved property and a builder and manager of real estate developments, whereby, in consideration of his undertaking to give his services and financial assistance in improving and marketing the property, he is to become possessed of an undivided one-third interest in said property, created a partnership with respect to the venture.

In the case of **Manson v. Williams (C. C. A. 1st), 153 Fed. 525**, Judge Putnam states:

> "The right to share profits is an indication of the existence of a copartnership, but it may result from an agreement to that effect or it may flow out of the relationship which exists between the parties. It is true that the present case is embarrassed by the fact that, in the absence of any agreement as to the profits, in connection with the further fact that Henry Hudson contributed only assets, while James Hudson contributed only personal services, it may be difficult to determine how profits would have been shared, and therefore it is plausible to suggest that there could have been no profits, and consequently no partnership. Nevertheless, both of these details are met by **Paul v. Cullum, 132 U. S. 539**, where it was observed that, in the absence of any evidence showing a definite intention, partners would be held to share equally in the profits and losses."
>
> "The result is that whatever may have been the intention when Henry Hudson put the property into the

hands of James Hudson to be managed by him, those gentlemen and the circumstances of the business drifted entirely away from it, and the relations between them must be determined by what afterwards ensued. Those relations embraced all of the elements necessarily included in the definitions given by the Partnership Act (referring to the English Act) and by Mr. Justice Gray (referring to Meehan v. Valentine, supra) * * *."

In the case of **Re John E. Enright (C. C. A. 2d), 40 Fed. (2d) 588**, Judge Chase states:

"It is thought by the claimant that these libels in rem will not lie against the tug, however, because it is claimed that the Independent Towing Company and the barge owners had by their agreement entered into a partnership into which the tugs and barges had been put as partnership property. We think their agreement did create a partnership. They voluntarily joined in the business of general transportation of merchandise on the canal between New York and Buffalo. The principal contribution of one party was the motive power and that of the others the carrying capacity. All were to own an agreed interest in the net profits as such after expenses were paid. All the essential earmarks of a partnership were embodied in this agreement. **Meehan v. Valentine, 145 U. S. 611, 12 S. Ct. 972, 36 L. Ed. 835; Ward v. Thompson, 22 How. 330, 16 L. Ed. 249.**"

Before turning to a consideration of the evidence of partnership in the record in the instant case we direct the Court's attention to the further rule of partnership law, quoted approvingly in **Meehan v. Valentine**, supra: a showing of participation in profits constitutes prima facie or presumptive proof of the existence of the partnership

relation. As held by the Court in **Huteson v. U. S. (C. C. A. 7th), 67 Fed. (2d) 731,** proof of participation in profits constitutes presumptive evidence of partnership, and thereupon it became the duty of the Court to consider such evidence of partnership, together with all other material evidence in the case in determining the true status of the parties. "It certainly cannot be denied that the presumption arising from appellant's extensive participation in the profits, constitutes substantial evidence of his partnership in the business. Whether this presumption was outweighed by other evidence was a matter of fact to be determined by the trial court, and with that we are not concerned."

In the instant case the record affirmatively reflects: "Tobin testified in answer to the question of whether he had a silent partner on the Carlinville job that there was an arrangement between himself and Guy S. Martin that if he (Tobin) was short of money he was to draw on Martin and Martin was to help him out from time to time, and if at the conclusion of the job there was a profit, that they were to split the profit" (R. 137). He further testified: "While there was nothing in writing, it was agreed that if I needed funds at any time I could get a lift from Mr. Martin. In return for that, at the completion of the various jobs, the profits were to be divided on a fifty-fifty basis. That arrangement commenced on the Havana job and carried right on through the Carlinville job" (R. 138).

Tobin further testified that the arrangement was that at the conclusion of the job Martin was to be repaid the moneys he had advanced (in addition to his half of the profits), but that **he was not to be repaid until after Tobin had first paid all of his laborers and materialmen** (R. 141). See also Exceptor's Exhibit 2, being a letter written by Martin to Tobin on January 11, 1932, as follows:

"Dear Clem:

Your brother called the other day to tell me that you are the low bidder on the Carlinville Post Office, which was somewhat of a surprise to me. There must be a mistake somewhere as I thought you had your bid made out at $55,000.00. However, if you acquired any information which would warrant you in reducing it and know that it is all right, it is o. k. with me, provided we can satisfy the surety company.

Mr. J. W. Gerhardt, a friend of mine from Cape Girardeau would like very much to meet you in St. Louis, and if you will advise me when you expect to be here, I will arrange to have him meet with all of his dope on the Cape Girardeau Post Office" (R. 139-140)."

While on cross-examination Tobin testified that the letter referred to the matter of Martin obtaining a bond for Tobin on this contract, nevertheless it is significant that Martin wrote "it is o. k. with me, provided we can satisfy the surety company." It is apparent that, in addition to the question of satisfying the Surety Company, Martin felt called upon to give his personal approval to the matter of the reduction in the bid. It is a fair inference from Martin's later conduct in executing the bond contrary to express instructions of the vice-president of the National Surety Company (R. 80) that Martin was not concerned about the Surety Company when he wrote the above-mentioned letter, but was concerned only because of his personal interest in the venture.

The record further reflects that, toward the conclusion of the Carlinville post office job, December, 1922, and January, 1933, Martin affirmatively denied that Tobin was indebted to him for any amount (R. 82, 83, 86, 87). At the time Martin made these statements to various representa-

tives of the National Surety Company, it cannot be suggested that they were made because of his connection with the National Surety Company, because that connection had long since been terminated (R. 80). Such denials of indebtedness from the contractor coming from Martin's own lips are strong evidence that Martin considered the moneys advanced by him to be a contribution to capital in an enterprise in which he was then engaged (with Tobin) and not a mere loan as he later claimed.

Another equally cogent circumstance is that Martin himself testified under oath at the last hearing in this case:

> "I don't believe that we agreed upon any rate of interest in connection with the Tobin jobs for which I was furnishing money" (R. 143).

Yet Martin doesn't contend that he was to be compensated for the loan by a division of the profits in lieu of an agreed interest rate. He denies having had any agreement to share in the profits (R. 143). His admission that no interest rate was agreed upon negatives the idea of a loan and his unwillingness to admit having any agreement to share in the profits evidences a "guilty conscience" with respect to his real relationship to this job.

It is undisputed that Martin made arrangements whereby Tobin could draw checks directly against Martin's account (R. 96, 106). Another significant circumstance in connection with the moneys advanced by Martin is that he continued to furnish money to Tobin through the month of January and through the month of February of 1933 (R. 124-125), although in the first week of January, 1933, the branch manager of the National Surety Company checked about $9,000.00 of unpaid bills with Martin (R. 82), and on December 21, 1932, when Martin procured the power

of attorney from Tobin, he was advised by Tobin that there were going to be some bills to pay (R. 99), and, even before Martin received the power of attorney, Mr. Hauck, adjuster for the National Surety Company, told him that there were outstanding bills amounting to $9,500.00 (R. 101). It is equally significant that in January, 1933, after being advised that there were unpaid bills amounting to $9,000.00, Martin professed to believe that there was sufficient money in the contract to insure its completion and pay all bills (R. 82), although the then unpaid balance due from the Government totaled only $16,148.10 (being the $10,448.10 subsequently collected by Martin [R. 100], plus the $5,700.00 then remaining in the Government's hands [R. 79]), whereas, according to the claim he subsequently filed, there was due him as of January 6, 1933, the sum of $9,529.90 on the Carlinville post office job alone (R. 127). In spite of his knowledge of the amount of the unpaid bills, as pointed out, Martin expressed a willingness to have all labor and materialmen paid (R. 99, 101, 81).

Even after going to Washington and collecting the money under the power of attorney given to him by Tobin, Martin agreed to pay the unpaid laborers and materialmen (R. 87, 81, 100, 114); although adjuster Hauck advised him in December, 1932, that the outstanding bills amounted to $9,500.00 (R. 101), Mr. Edgar, local manager of the Surety Company, checked over $9,000.00 of unpaid bills with Martin during the first week in January, 1933, and in the office of the attorney for the National Surety Company on February 15, 1933, Martin saw bills which aggregated $13,000.00 (R. 100). There is nothing about Martin's conduct in connection with this entire transaction to cause one to conclude that his motives were merely altruistic when he expressed a willingness and a desire to see the bills of the laborers and materialmen paid. The more

reasonable conclusion is that his conduct reflected an admission of his own liability in the matter.

Martin not only advanced money on the Havana post office job on which Tobin was also the contractor, but he made arrangements with the surety on the job to collect the funds remaining due from the Government when Tobin defaulted in the payment of his bills on that job (R. 103, 104, 117-118, 97). Inasmuch as the job was completed in October of 1932 (R. 103), we are impelled to conclude that Martin had full and complete knowledge of Tobin's insolvency and inability to meet his debts as early as October, 1932. After binding himself to act as trustee for the Maryland Casualty Company, who was surety on the Havana post office job, Martin, in an effort to support his claim in the instant case, testified that he diverted such trust funds coming into his hands from the Havana job and applied them and permitted their use by Tobin on their joint enterprise in the Carlinville post office job and thereby left unpaid some $5,258.00 of labor and material bills on the Havana post office job (R. 98, 101, 104). Surely nothing less than a pecuniary interest in the Carlinville job could have caused Martin to so violate his trust on the other job, resulting in Martin being thereafter sued by the Maryland Casualty Company in connection with the matter (R. 141-142).

The next circumstance indicating the existence of the partnership relation between Tobin and Martin is that Martin's own secretary, offered as a witness in his behalf, testified to a custom of people having claims against Tobin calling Martin concerning the accounts, and of Martin then ordering the secretary to enter such items as a charge on his books. The secretary testified: "I would hear these people calling up about their accounts, and when he told me to enter them I just put them in * * *. We did not

pay out these items, but Mr. Martin guaranteed to pay them" (R. 103).

Although admitting that there was no agreement covering the matter of interest as has been pointed out, the records Martin offered at the trial reflected an arbitrary entry of a charge against Tobin of $1,000.00 which Martin calls "an arbitrary charge for interest" (R. 95) and concerning which Martin testified "at that time Mr. Tobin represented to me that he had considerable profit in both jobs, and I figured that would be fair" (R. 98). The matter of entering $1,000.00 charges against Tobin was not an unusual one according to Martin's secretary who testified: "**When Mr. Martin would tell me to charge up $1,000.00** I would put it in the ledger. I would take Mr. Martin's word for the charge, and put it down in the book the way he told me" (R. 102-103).

Another circumstance reflected by the record is that whenever the surety companies on Tobin's two construction jobs demanded control of the funds for the purpose of paying labor and material bills, Tobin invariably turned to Martin and insisted on Martin acting as his representative in such transactions (R. 99, 108, 103). It is also apparent from Martin's own testimony that he had no hesitancy in undertaking to speak for Tobin in dealing with the surety companies concerning the funds and that he did not deem it necessary to consult Tobin about those matters. In this connection he testified:

> "I did discuss the matter several times with Mr. Hauck in December and January, and I talked with him concerning the execution of some joint control agreement. **Mr. Hauck wanted these funds turned over to the National Surety Company and I told him that Mr. Tobin would not want to do that"** (R. 97).

The Chancellor below who heard the witnesses testify and observed their demeanor on the stand, concluded that the facts reflect that Martin's relation with Tobin in this case was considerably more than that of a mere money lender and that under the test laid down in **Meehan v. Valentine,** supra, relied on so confidently by petitioner, the parties had "joined together to carry on a trade or adventure for their common benefit, each contributing property or services and having a community of interest in the profits." Accord: **Ruggles v. Buckley et al. (C. C. A. 6th), 158 Fed. 950,** holding that a partnership is a fact like any other fact, which may be established by circumstances, and it is not essential to its existence that there should be a partnership name or a formal partnership agreement; and **Causey v. Cottman Co. (C. C. A. 4th), 12 Fed. (2) 558,** wherein the Court states:

> "The testimony as to respondent Leander Langrall being responsible along with the two Causeys is, to our mind, clear and conclusive. He was so related to the transactions, in the light of his connection with the two respondents Causey in this work, and his past association with them in other contracts of a similar character, as to clearly make him liable along with them, certainly so far as third persons are concerned, in this particular transaction. Under this contract he participated in carrying out the same, advancing money to pay bills for the tug and lighter, and for other purposes, and was to have shared in the profits as he had done under other similar contracts."

Another enlightening discussion of the general matter of partnerships is to be found in **Fechtler v. Palm Bros. & Co. (C. C. A. 6th), 133 Fed. 462,** by Judge (afterwards Mr. Justice) Lurton.

Under the circumstances herein outlined, respondents

respectfully urge that the Chancellor's conclusions with respect to the true facts in this case are amply supported by the evidence. The arrangement that existed between Martin and Tobin might be termed a "Joint Enterprise" which is in the nature of a partnership concerning a single venture or transaction (see **Dexter & Carpenter, Inc., v. Houston et al. [C. C. A. 4th], 20 Fed. [2d] 647**).

D.

An Agent Who Has Violated Specific Instructions of His Principal and Thereby Placed His Principal in a Position Where it is Likely to Suffer Loss in a Transaction, Becomes Liable to His Principal as an Indemnitor for any Loss Resulting From His Wrongful Act and the Agent Cannot Thereafter be Heard to Assert That He Has Acquired Prior Rights in Funds Arising in Connection With Such Transaction for Which He Remains an Indemnitor of His Principal Even Though the Agency Relationship Has Since Terminated, But Will be Required to Account to the Principal for Such Money Thereafter Received by Him in Connection With Such Transaction.

There are additional equally cogent reasons why Martin cannot be heard to assert his alleged right to these funds. The record reflects the fact that Martin was an underwriting agent for plaintiff, National Surety Company, at the time this bond was executed (R. 80). By the undisputed evidence in this record, appellant, Guy S. Martin, was expressly instructed by the vice-president of the National Surety Company, in charge of its St. Louis office, not to execute the particular bond which is involved in this case. Martin executed it anyway (R. 80). Of course, under

elementary principles of corporation law, an executive officer of a corporation, such as the vice-president in charge of the company's affairs in a particular locality, is the alter ego of the corporation with full authority to control and direct his subordinates. It is equally well established that an agent who disregards explicit instructions of his principal becomes liable to the principal for any loss resulting therefrom. (See **Bank of Br. N. A. v. Cooper, 137 U. S. 473, 34 L. Ed. 759; 2 C. J., Sec. 370.**) So we find appellant Martin, at the time he procured his power of attorney in December of 1932, occupying the position of an indemnitor of the Surety Company, in connection with the identical matter in which he was endeavoring to circumvent the Surety Company's efforts to protect itself against loss.

If the Surety Company should suffer a loss on the job Martin would be liable to the Surety Company for such loss (since he got them into the matter by violating explicit instructions). Under such circumstances Martin could not even be permitted to share with the Surety Company in the funds in question, much less be permitted to acquire rights in derogation of the Surety Company's rights (**American Surety Co. v. Westinghouse E. M. Co., 296 U. S. 133, 80 L. Ed. 31**; see, also, **Trice v. Comstock [C. C. A. 8], 121 F. 620**).

In addition to what has already been said concerning this situation appellant Martin, at the time he violated the Surety Company's instructions and bound it on the bond in question, was acting in connection with a scheme for his own personal gain and enrichment, to wit, to share in the profits arising from the job (R. 138). Even though Martin was discharged as the Surety Company's agent shortly after he executed this bond (R. 80), yet his subsequent advancement of money to Tobin and procuring

the power of attorney in question from Tobin was necessarily a part of the prior plan which arose during Martin's agency for the Surety Company (R. 138), and Martin will not thereafter be permitted to acquire any interest in moneys arising out of the identical transaction, when his principal is thereby caused to suffer a loss, and the former agent would thereby profit from his own wrongful act. As stated in the case of **Commonwealth Finance Corporation v. McHarg (C. C. A. 2), 282 F. 650:**

> "No principle is better established in the law than that loyalty to his trust is the first duty which every agent owes to his principal. It underlies all agencies. The law condemns as contrary to public policy any conduct in an agent which involves a breach of fidelity in that relationship which is most jealously guarded. An agent will not be permitted to place himself in a position where his own interest may become antagonistic to those of his principal. • • •
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> "And, of course, what the law does not permit an agent to do directly, it will not permit him to do indirectly. He cannot evade the law by causing the property to be purchased ostensibly for another, but in reality for himself. The Court in all such cases looks behind the appearance in which the transaction has been clothed, and will decide the case in accordance with the naked facts, which it has been sought to cover up and conceal" (citing cases).

In the case of **Trice et al. v. Comstock et al. (C. C. A. 8), 121 F. 620,** Judge Sanborn stated:

> "For reasons of public policy, founded in a profound knowledge of the human intellect and of the motives that inspire the actions of men; **the law peremptorily forbids every one who, in a fiduciary relation, has acquired information concerning, or interest in, the business or property of his correlate from using**

that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquired in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. This inexorable principle of the law is not based upon, nor conditioned by, the respective interests or powers of the parties to the relation, the times when that relation commences or terminates, or the injury or damage which the betrayal of the confidence given entails. It rests upon the broader foundation, upon that sagacious public policy which, for the purpose of removing all temptations, removes all possibility that a trustee may derive profit from the subject matter of his trust, **so that one whose confidence has been betrayed may enforce the trust which arises under this rule of law, although he has sustained no damage, although the confidential relation has terminated before the trust was betrayed.** • • •

"**And, within the prohibition of this rule of law,** every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law in relation of trust and confidence. **The relation of** trustee and cestui que trust, **principal and agent** • • • who, through the employment, gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation • • •. The law both implies a contract and imposes a duty that the servant shall be faithful to his master • • • the agent to his principal • • •."

(Accord: **2 C. J., Secs. 353-354; Cragin v. Powell, 128 U. S. 691, 32 L. Ed. 566; Dennison & Co. v. Aldrich, 114 Mo. App. 700; Grumley v. Webb, 44 Mo. 444; U. S. v. Carter, 217 U. S. 286.**)

E.

Where One Who Claims to Have Loaned Money to a Contractor Obtains a Power of Attorney From the Contractor Under an Express Agreement to Collect the Money for the Contractor and to First Apply It to the Payment of All Unpaid Labor and Material Bills on the Job in Connection With Which the Funds Accrued, He Will Be Required to Account to the Laborers and Materialmen and the Contractor's Surety, Who Would Otherwise Be Liable for the Payment of Such Laborers and Materialmen, as Such Funds Will Remain Impressed With a Trust in Conformity With the Agreement Under Which They Were Collected.

The evidence clearly establishes that the power of attorney which was given by the contractor to Martin was given under an express arrangement whereby he agreed to become primarily a trustee for the benefit of laborers and materialmen on the job.

The contractor, Tobin, testified:

> "On Saturday afternoon I authorized Mr. Martin to go to Washington **to collect that money for me**; I did that because if the money got in your control (referring to the Surety Company), then I would be sitting on the outside looking in" (R. 108).

Tobin also expressly testified that while he had agreed to repay Martin for moneys advanced by Martin, nevertheless the arrangement was that **Martin was not to be repaid** until after Tobin had first paid all of the laborers and materialmen (R. 141). Martin himself made the following admission about the purpose of the power of attorney:

> "**When he gave me the power of attorney he said**

there were going to be some bills to pay and he wanted me to handle these funds. I don't know why he wanted me to; he had done that before" (R. 99).

Although Martin's subsequent testimony about the purpose of the power of attorney varies from the foregoing, the trial court chose to believe his admission against interest, and to disbelieve his other explanations to the effect that the power of attorney was given to him to repay his loan. In view of the foregoing evidence, this Court should not hesitate to hold that the funds were impressed with a trust in Martin's hands in favor of respondent.

F.

The Assignment of a Chose in Action Made by an Insolvent Debtor With Intent to Defraud Creditors, and With a Reservation of Right in Favor of the Debtor, Is Void, and the Grantee Acquires Neither Legal Nor Equitable Rights Thereunder.

Even if we accept Martin's other explanations, which, in effect, constituted the power of attorney an assignment of Tobin's claim to Martin, it would clearly be a fraudulent conveyance under the facts and circumstances in evidence. The Missouri statutes declaring fraudulent conveyances void provide:

> "Every deed of gift and conveyance of goods and chattels in trust to the use of the person so making such deed of gift or conveyance, is declared to be void as against creditors, existing and subsequent, and purchasers" **(R. S. Mo. [1929 Ed.], Sec. 3116).**
>
> "Every conveyance or assignment in writing or otherwise • • • in goods and chattels or in things in action • • • made or contrived with the intent to hinder, delay or defraud creditors of their lawful actions, damages, forfeitures, debts or demands • • •

> shall be from henceforth deemed and taken as against said creditors and purchasers, prior and subsequent, to be clearly and utterly void" **(R. S. Mo. [1929 Ed.], Sec. 3117).**

The trial court found that Martin's assignment was fraudulent and void (R. 48). The entire transaction bears the following badges of fraud: In the latter part of December, 1932, when Martin procured the power of attorney from Tobin, Martin only claimed a balance due of about $8,200 (R. 96), whereas the funds remaining in the Government's hands which his power of attorney purported to cover, then totaled about $17,000 (R. 101). Therefore, the power of attorney covered more than Martin's claim and, in addition, carried with it a trust in favor of Tobin, the debtor. In this connection Tobin's testimony is interesting:

> "On Saturday afternoon, I authorized Mr. Martin to go to Washington **to collect that money for me.** I did that because, if the money got in your control, then I would be sitting on the outside looking in" (R. 108).

Martin admitted that Tobin reserved the right to revoke the power of attorney (R. 101). In addition to the badges of fraud arising from the fact that the power of attorney covered more than the amount of Martin's alleged debt, and the fact that under the undisputed evidence funds were held in trust for the benefit of the debtor, there is the further significant evidence previously set forth showing Martin's false statements to the effect that Tobin owed him no money and his fraudulent concealment of the fact that he had acquired the power of attorney in question. If this was a good-faith transaction why was it necessary for him to conduct himself as he did? The trial court's finding that this was a fraudulent con-

veyance is amply supported by the facts and is in accord with the authorities. See:

Batavia v. Wall, 102 Fed. 240;
W.-P. Company v. Low, 54 Fed. 93;
C. T. Company et al. v. Woodbury, 77 Fed. (2d) 478.

G.

Where a General Creditor of the Contractor on a Federal Public Work Holds a Void Written Assignment or Power of Attorney From the Contractor, and by False Statements and Fraudulent Concealment Lulls the Surety Into a Feeling of Security, Directly Resulting in the Surety Delaying the Taking of Any Action, Such Assignee, Upon Thereafter Collecting the Funds From the Government, Is Estopped to Assert That by So Collecting Such Funds He Has Acquired Any Rights Therein Superior to the Equitable Rights of the Surety and of the Laborers and Materialmen.

In the first place, petitioner Martin was involved with his codefendant Tobin, the contractor, in the prosecution of this public work, as well as the prior Havana post office job. Assuming, for the sake of argument, as Martin does in his brief herein, that the evidence did not establish either a partnership or a joint venture, yet the record in this case reflects that, in addition to having an agreement with Tobin to share the profits, petitioner Martin had personally obligated himself to furnish money to Tobin, as he might need it from time to time during the progress of his federal work projects (R. 138). A fiduciary relationship existed between Martin and Tobin to the extent that Martin not only shared in the profits, but was obligated to furnish Tobin with money. This situation existed at the time Martin bound and obligated the National Surety Company on the bond involved in this case, although

Martin concealed his personal interest in the venture from his principal. In the fall of 1932, when the Surety Company became aware of Tobin's default in payment of labor and material bills on the job, it promptly endeavored to protect its rights by demanding of Tobin that he execute a power of attorney in its favor. This was on December 20, 1932, and, while Tobin promised to see his attorney about the matter, he immediately went to petitioner Martin (R. 108). From the haste with which petitioner Martin then acted in procuring a power of attorney in his own favor (R. 99), it is fair to infer that Tobin told Martin of his own inability to pay claims, and of the Surety Company's demand for protection. Martin also then knew of Tobin's default on the Havana job, as he had undertaken to act as trustee for the Maryland Casualty Company, surety on the job, following the contractor's default in payment of his bills, and the job was completed in October, 1932 (R. 103). From that time until the night of the following February 4th, when Tobin left a conference at which he and his attorney (the present attorneys for Martin) assured the National Surety Company's attorney that it would be promptly given joint control with Tobin over all funds in the Government's hands (R. 86, 87, 108), the record reflects a series of affirmatively false statements by Martin to the Surety Company to the effect that Tobin was not indebted to him in any amount, and fraudulent concealment by petitioner Martin (see **Cosby v. Buchanan, 23 Wall. 420, 23 L. Ed. 137**) of the fact that Tobin had given to Martin the power of attorney or assignment under which Martin later collected the funds (R. 81-87). Martin's power of attorney was void at the time of its execution **(Prairie State Bank v. U. S., 164 U. S. 227)**. Since his subsequent collection of the funds was accomplished by the fraud and concealment just set forth, an equitable estoppel arose. With reference to the doctrine of equitable estoppel, Story states:

"In all of this class of cases the doctrine proceeds upon the ground of constructive fraud or of gross negligence which in effect implies fraud. • • • It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be a positive fraud or concealment or negligence so gross as to amount to constructive fraud" **(1 Story, Equity 391).**

To the same purport is the language of the authorities. Thus the Supreme Court of Pennsylvania has stated:

"The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of the denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up" **(Hill v. Epley, 31 Pa. St. 334).**

Accord:

Angle v. C. St. P. M. & O. Ry. Co., 151 U. S. 1;
Kirk v. Hamilton, 102 U. S. (12 Otto) 68.

The Supreme Court of Missouri, in the case of **McNew v. Booth, 42 Mo. 189,** states:

"It is a well settled principle of equity law that where a purchaser becomes such, under such circumstances or state of facts as would make it a fraud to permit him to hold onto his bargain, as by representing that he is buying for the benefit of the embarrassed debtor in the execution, or that he intended to reconvey the property, and thereby obtains it at a sacrifice, the Court will relieve against such fraud; and the person who has gained an advantage by means of such fraudulent act will be converted into a trustee for those who have been injured thereby." (Citing cases.)

See, also, Grumley v. Webb, 44 Mo. 444.

H.

One of the Basic Principles of Equity Jurisprudence Is That One Must Come Into Equity With Clean Hands.

This principle alone constitutes an insurmountable obstacle to the claim of petitioner Martin. On March 24, 1934, petitioner Guy S. Martin filed a sworn claim in this cause (R. 34), wherein he made affidavit to an honest belief that all of the moneys advanced to Tobin by him were paid for materials and labor that actually entered into the Carlinville, Illinois, post office (R. 38). Just seven days thereafter Martin's deposition was taken in the case of Maryland Casualty Company v. Guy S. Martin, pending in the Circuit Court of the City of St. Louis, Missouri (wherein the Maryland Casualty Company was endeavoring to procure an accounting on the Havana, Illinois, post office job), and in that deposition Martin swore that $5,672.00 of the amount of the claim he filed in the instant case covered advances made for the payment of bills on the Havana post office job. When asked why he included that amount in his claim in this suit he replied, "I wanted to see them paid" (R. 142). See, also, audit of Schuessler, Keller & Co. (R. 136-137). The Supreme Court of the United States in the case of **Brown, Bonnell & Co. v. Lake Superior Iron Co., 134 U. S. 530, 33 L. Ed. 1021,** states:

> "But the maxim, 'he who seeks equity must do equity,' is as appropriate to the conduct of the defendant as to that of the complainant • • •."

In conclusion, the Chancellor who tried this case had an opportunity to see the witnesses and observe their manner in testifying, to determine which of their several conflicting statements most nearly conformed to the facts, and to weigh the credibility of all of the evidence. His decision and conclusions are entitled to great weight upon a review

of the matter by this Court. Premises considered, these respondents respectfully submit that the decree and finding of the trial court and of the Court of Appeals is consonant with equity and justice, and upon authority and reason such decree should by this Court be affirmed.

Respectfully submitted,

J. H. CUNNINGHAM, JR.,
Solicitor for Respondents:
Alton Brick Company,
James Beveridge,
Mississippi Lime & Material Company,
Koerner Engineering Company,
Wenzil Andris,
Schwartz Materials Company,
Usona Manufacturing Company,
Brass & Copper Sales Company,
Hunkins-Willis Lime & Cement Company,
The McClelland Company,
H. E. Kennedy,
Robert E. Lancaster,
Peter Vredenburgh Lumber Company,
H. H. Sandman,
Masker Brothers Iron Company,
St. Louis Asphalt Company,
Otto G. Braun,
Straub Bros.,
Walter G. Malham,
Larry Schaff,
Galloway-Von Gruenigen Company,
C. F. Rabbeitt Company,
Shapleigh Hardware Company,
Italian Marble Company,
Winkle Terra Cotta Company,
Jack Hyde,
Illinois Steel Bridge Company.

Of Counsel:
WILLIAM L. IGOE.

SUPREME COURT OF THE UNITED STATES.

No. 500.—October Term, 1936.

Guy S. Martin, Petitioner,
vs.
National Surety Company, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 29, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

A controversy is here as to the interests of rival claimants in moneys paid by the Government pursuant to a building contract, the one claim being founded on an assignment to a surety, which is held for the benefit of materialmen and laborers, the other on a power of attorney, later than the assignment, which was given to a creditor as security for a loan.

On February 12, 1932, a contract was made between the Government of the United States and Tobin, a builder, for the construction of a Post Office at Carlinville, Illinois. The statute called for a bond with a good and sufficient surety conditioned to the effect that the contractor would promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work. 40 U. S. C. § 270; *American Surety Co.* v. *Westinghouse Electric Co.*, 296 U. S. 133, 135. Such a bond was given in the sum of $25,000 by the National Surety Company, acting through Guy S. Martin, its agent. Martin, who is the petitioner in this court, had been ordered by one of the officers of the company not to execute the bond, and in signing it disobeyed the order. The fact of disobedience was unknown to the obligee, and by concession the bond is binding according to its terms. In a written application the contractor stated to the surety that he had not assigned and would not assign to third persons his payments on the contract or any part thereof. In further consideration of the execution of the bond he did by the same instrument assign the payments to the surety in the event of any breach or default in the

contract, the proceeds to be credited upon any loss or damage.* There was also a covenant of indemnity, and a covenant that in the event of the filing of any liens there would be a deposit with the surety sufficient to secure them.

Martin's agency was canceled after the writing of the bond in breach of his instructions. With full knowledge of the application and of the duties there assumed, he loaned moneys to the contractor from time to time under an agreement for the division of the profits of the enterprise. By December, 1932, when the building was near completion, the total of these loans was in excess of $10,000, exclusive of any interest. The work had been done to the satisfaction of the Government, but bills for labor and materials were largely in default. The surety became alarmed. In the latter part of December an officer of the company gave notice to the contractor that the company would insist upon the execution of a power of attorney for the collection of any payments then owing from the Government or falling due thereafter. Tobin took the document away with him, promising to show it to his lawyer. Instead he showed it to Martin, for whose benefit he signed another power of attorney as well as a letter, addressed to the Treasury Department, directing that all checks for Tobin should thereafter go to Martin. These documents were intended to have the effect of an assignment which would be security to Martin for the amount of his advances. Both documents were forwarded to the Treasury as soon as they were signed. The surety did not know of them till five or six weeks later. At last, on February 4, 1933, Tobin, pressed again to carry out his agreement, admitted that the power of attorney had been turned over to Martin, but promised to try to get it back. Even then there was denial that it was on file in the Treasury. But the promise, even if sincere, was no longer susceptible of fulfilment. On the very day it was made, Martin had

*The assignment reads as follows: "That in further consideration of the execution of said bond, the undersigned hereby assigns, transfers and conveys to the Company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned at the time of any breach or default in said contract, or that thereafter may become due and payable to the undersigned on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the Company and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it under said bond."

gone to Washington, had visited the Treasury, and had received from the Government a warrant for $10,448.10, the progress or deferred payments then due upon the contract. This sum he collected on February 6, and applied upon his loans. At that time the building was substantially completed, though there was still owing from the Government $5700, made up of a retained percentage plus a small additional amount to cover unfinished work.

The surety ascertained the truth a day or two thereafter. On February 9, 1933, it brought suit in a District Court in Missouri to protect the interests of the materialmen and laborers, joining Tobin and Martin as defendants as well as certain officers of the Government. It prayed *inter alia* that the moneys received by Martin be impounded, and that the fund, when deposited in court, be disbursed in payment of the bills for material and labor, and in exoneration of the bond. At the beginning of the suit, Tobin was already insolvent. The surety became insolvent later, and renounced in favor of the materialmen and laborers all its rights and interests in the fund in litigation. Martin, yielding to the compulsion of interlocutory decrees, paid into the registry of the court what he had collected from the Government. After notice to materialmen and laborers to file their claims against the fund, the court made a final decree disposing of the controversy. Martin's claim was dismissed on the ground that he was a partner with the contractor, and could gain nothing by his assignment except in subordination to the creditors. The claims of materialmen and laborers (hereinafter, for convenience, referred to as materialmen) were considered and adjudicated, and distribution was decreed.

The case went to the Court of Appeals for the Eighth Circuit upon an appeal by Martin. The decree was there affirmed. 85 F. (2d) 135. Without disputing the finding that Martin was to share with Tobin in the profits of the enterprise, the Court of Appeals did not pass upon the question whether the relation was one of partnership. It placed its ruling upon the broad ground that, apart from any assignment or any statute, the proceeds of a building contract are chargeable in favor of materialmen with an equitable lien, which attaches upon collection, even if not before, and which cannot be overriden at the will of the contractor by payment to his other creditors, though the payment be made in fulfilment of a promise. For this it cited *Belknap Hardware & Mfg. Co.* v. *Ohio*

River Contract Co., 271 F. 144, and *United States Fidelity & Guaranty Co.* v. *Sweeney*, 80 F. (2d) 235, 238, conceding the existence of other cases *contra*. *Third Nat. Bank* v. *Detroit Fidelity & Surety Co.*, 65 F. (2d) 548; *Kane* v. *First Nat. Bank of El Paso, Texas*, 56 F. (2d) 534; *Fidelity & Deposit Co.* v. *Union State Bank*, 21 F. (2d) 102. The opinion dwells upon the confusion in which the subject is enveloped. We granted certiorari.

Our decision will be kept within the necessities of the specific controversy here. Even so, the grounds chosen, though narrower than those assigned below, may be expected to be helpful as a guide in other cases. The proceeds of the contract, when collected by Martin under his power of attorney, were received by him with knowledge of the agreement between the contractor and the surety whereby such proceeds became a fund to be devoted in the first instance to the payment of materialmen and others similarly situated. In our view of the law, the equities in favor of materialmen growing out of that agreement were impressed upon the fund in the possession of the court.

An Act of Congress tells us that all transfers and assignments "of any claim upon the United States . . . and all powers of attorney, orders, or other authorities for receiving payment of any such claim . . . shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." R. S. § 3477; 31 U. S. C. § 203. By force of that pronouncement the Government was at liberty to hold the money back till demanded by the contractor personally, disregarding any assignment or power of attorney for its payment to another. But the Government did not choose to shape its course accordingly. It turned over the money to Martin as Tobin's representative, thus discharging its indebtedness as effectively as if payment had been made directly to the principal. *McKnight* v. *United States*, 98 U. S. 179. The case is to be viewed as if Tobin had received the warrant, had put the proceeds in his bank, and had paid them afterwards to Martin. Will Martin be allowed to keep them in the face of his knowledge of the earlier assignment to the surety and of the promise that no assignment would be made to anyone else?

The provisions of the statute making void an assignment or power of attorney by a Government contractor are for the protection of the Government. *Hobbs* v. *McLean*, 117 U. S. 567, 576; *McGowan* v. *Parish*, 237 U. S. 285, 294, 295. In the absence of such a rule, the Government would be in danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability. *Hobbs* v. *McLean*, *supra*. But as applied to the fund in controversy, that peril is now past. The fund is in court to be distributed to rival claimants, with the Government discharged irrespective of the outcome. The very fact that an assignment is permitted even as between the contractor and the Government itself when the warrant is outstanding, if the transfer be executed with prescribed formalities, is significant that the Government is not concerned to regulate the equities of claimants growing out of irregular assignments when collection is complete and liability is ended. The purpose of the statute "was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed." *Hobbs* v. *McLean*, *supra*. A transfer of a warrant has need to be accompanied by safeguards lest the assignor may avoid it afterwards for forgery or fraud. A transfer of the fund after payment is perfected is of no concern to any one except the parties to the transaction, and this quite irrespective of the time of the assignment or the manner of its making.

If the Government has any interest in the outcome of this controversy it is in sustaining the assignment to the surety rather than destroying it. The contractor undertook that materialmen would receive their money promptly while the work was going on. In failing to pay them, he violated a duty to them, but a duty also to the Government, for the default was a breach of the condition of the bond. If the assignment to the surety creates a lien upon the fund, the contractor will be compelled to fulfill the duty thus assumed. A different question would be present if the surety were seeking to keep the money for itself. Cf. *American Surety Co.* v. *Westinghouse Electric Co.*, *supra*; *Jenkins* v. *National Surety* Co., 277 U. S. 258, 266. There is no such effort here. On the contrary, the surety claiming nothing for itself, is devoting the full proceeds of the assignment to the satisfaction of the liabilities covered by the bond. Has the assignment been so obliterated through the condemnation of the statute that when used by the surety in aid of such a purpose it does not generate an equity worthy of recognition?

The advocates of literalism find color of support in a line of decisions made in very different circumstances from these, but tending none the less to a strict construction of the statute. *National Bank of Commerce* v. *Downie*, 218 U. S. 345; *Nutt* v. *Knut*, 200 U. S. 12; *Spofford* v. *Kirk*, 97 U. S. 484; *United States* v. *Gillis*, 95 U. S. 407. We do not pause to inquire with reference to all the cases whether the necessities of the judgment were as broad as the words of the opinion. Thus, in *National Bank of Commerce* v. *Downie*, *supra*, to give a single illustration, where the controversy was between the trustee in bankruptcy of the contractor and prior assignees, the claims against the Government which were the subject of the assignment had never been allowed, much less collected, though the decision cannot be said to have been put on that ground. Another line of cases exhibit an opposing tendency. *Lay* v. *Lay*, 248 U. S. 24; *Portuguese-American Bank* v. *Welles*, 242 U. S. 7, 11, 12; *McGowan* v. *Parish*, *supra*; *Freedman's Saving Co.* v. *Shepherd*, 127 U. S. 494, 506; *Hobbs* v. *McLean*, *supra*; *Bailey* v. *United States*, 109 U. S. 432, 439; *Goodman* v. *Niblack*, 102 U. S. 556, 559; *McKnight* v. *United States*, *supra*; *Erwin* v. *United States*, 97 U. S. 392. Cf. *York* v. *Conde*, 147 N. Y. 486, dismissed 168 U. S. 642. These cases teach us that the statute must be interpreted in the light of its purpose to give protection to the Government. After payments have been collected and are in the hands of the contractor or subsequent payees with notice, assignments may be heeded, at all events in equity, if they will not frustrate the ends to which the prohibition was directed. See *Lay* v. *Lay*, *supra*, aff'g 118 Miss. 549. To the extent that the two lines of cases are in conflict, the second must be held to be supported by the better reason Many an analogy from fields uncovered by the statute reinforces that conclusion. An assignment ineffective at law may none the less amount to the creation of an equitable lien when the subject matter of the assignment has been reduced to possession and is in the hands of the assignor or of persons claiming under him with notice. *Western Union Telegraph Co.* v. *Shepard*, 169 N. Y. 170; *Walker* v. *Brown*, 165 U. S. 654; *Fourth Street Bank* v. *Yardley*, 165 U. S. 634; *Ketchum* v. *St. Louis*, 101 U. S. 306. All this is familiar law. No reason is discoverable in the policy of the statute why the analogy should be rejected in its application to the case at hand. Far from defeating or prejudicing the interests of the Government, the recog-

nition of the equities growing out of the relation between the contractor and the surety will tend, as already has been suggested, to make those interests prevail. Cf. *Equitable Surety Co.* v. *McMillan*, 234 U. S. 448, 456. It would be a strange construction of the statute that would make it necessary for the Government to declare the equities illusory when they serve its own good.

In what has been written we have assumed that the failure to pay materialmen was a default of such a nature as to impose a duty on the contractor to turn over the payments to the surety upon appropriate demand. There is argument to the contrary. According to that argument the moneys were to be assigned in the event of default in the performance of the contract between the contractor and the Government, and not upon the failure to pay persons other than the Government who had claims against the contractor for materials or labor. But the statute directs that a bond for the prompt payment of materialmen and laborers shall be executed by the contractor before the commencement of the work. Not only that, but the contract with the Government, which was drawn in the standard form, is a confirmation and adoption of the statutory duty. The terms of the bond are read into the contract, and there is default under the contract when there is default under the bond.

We conclude that Martin's interest in the fund was correctly held to be subordinate to the interests of other claimants. Without denying the possibility of arriving at the same conclusion through other avenues of approach, we follow the pathway that has been marked in this opinion.

The decree should be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.